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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HOSPITAL SAN RAFAEL, INC. AND
CENTRO MEDICO DEL TURABO, INC., AND ITS SUBSIDIARIES,
TURABO MEDICAL CENTER LIMITED PARTNERSHIP AND
HOSPITAL INTERAMERICANO DE MEDICINA AVANZADA,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a finding of unlawful employer intent to avoid labor law obligations is essential to the imposition of alter ego status under the National Labor Relations Act.

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Comment, *Bargaining Obligations After Corporate Transformations*, 54 N.Y.U. L. Rev. 624 (1979) 20

Note, *Labor Law's Alter Ego Doctrine: The Role of Employer Motive in Corporate Transformation*, 86 Mich. L. Rev. 1024 (1988) 19, 20, 25

Frederick K. Slicker, *A Reconsideration of the Doctrine of Employer Successorship -- A Step Toward a Rational Approach*, 57 Minn. L. Rev. 1051 (1973) 20

Other Authorities

The Developing Labor Law (Raymond L. Wheeler et al. eds., 3d ed. 1992 & 1st Supp. 1993) 19

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HOSPITAL SAN RAFAEL, INC. AND
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PETITION FOR A WRIT OF CERTIORARI

Hospital San Rafael, Inc. ("San Rafael") and Centro Medico del Turabo, Inc. ("Centro Medico") and its subsidiaries, Turabo Medical Center Limited Partnership ("Turabo Medical Center") and Hospital Interamericano de Medicina Avanzada ("Hospital Interamericano") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.[1]

OPINIONS BELOW

The order and opinion of the court of appeals (App. 1a-14a) is officially reported at 42 F.3d 45 (1st Cir. 1994) and is unofficially reported at 148 LRRM (BNA) 2153 and 129 Lab. Cas. (CCH) ¶ 11,240. The decision and order of the National Labor Relations Board ("NLRB" or "Board") (App. 15a-35a) and the decision of the Administrative Law Judge ("ALJ") (App. 36a-125a) are officially reported at 308 NLRB 605. They are also referenced in 142 LRRM (BNA) 1157 and 1992-93 NLRB Dec. (CCH) ¶ 17,456. An order of the NLRB granting in part Petitioners' Motion for Reconsideration and Clarification of portions of the Board's remedial order (App. 126a-32a) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1994. Petitioners' timely petition for rehearing with suggestion for rehearing in banc was denied on February 1, 1995. App. 133a-34a. This Petition is filed

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[1] Rule 29.1 Statement: Hospital San Rafael, Inc. is a subsidiary of San Rafael Planning, Inc.

within ninety days of said Order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), provides in part:

> It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a) [of the National Labor Relations Act].

Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), provides in part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or

> the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), provides in part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

STATEMENT OF THE CASE

A. San Rafael and Centro Medico.

San Rafael operated a general neighborhood hospital in Caguas, Puerto Rico for many years. App. 2a, 16a, 54a. In 1978, two doctors -- Jaime Soler and Jose Badillo -- purchased over 80 percent of San Rafael's stock. App. 2a, 55a. Drs. Soler and Badillo soon discovered that San Rafael was losing money and was in danger of going into bankruptcy. App. 2a, 16a, 58a. They called in Joaquin Rodriguez as a financial consultant. App. 58a. Rodriguez became president of San Rafael and a member of the San Rafael Board along with Soler and Badillo. App. 2a, 55a, 58a.

About six months after Rodriguez arrived at San Rafael, an inspection of the hospital by Puerto Rican health authorities revealed that San Rafael was not in compliance with Medicare requirements, primarily because of problems arising out of an aging and antiquated physical plant. App. 2a, 16a, 58a-59a. If San Rafael did not correct the problems identified in the Medicare inspection, it would forfeit its eligibility to receive payments for treatment of Medicare patients. App. 2a, 58a. These patients constituted almost half of the occupants of San Rafael at that time. App. 2a, 58a.

The obligations imposed by the Medicare rules would "have made it necessary to tear down the whole place and rebuild from scratch." App. 59a. Soler, Badillo, and Rodriguez, therefore, began to discuss the construction of a new hospital. App. 2a, 59a. As the First Circuit stated, "[i]t was conceived that a new corporation would be established, partly because San Rafael itself could not obtain loan funds, and in addition the new hospital was expected to be more than a local hospital and to draw patients from the Caribbean basin." App. 2a.

Centro Medico was created to plan and eventually to build and operate the new hospital that would supplant San Rafael. App. 2a-3a, 16a, 45a.[2] Rodriguez acquired an ownership interest in Centro Medico, with Soler and Badillo

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[2] Turabo Medical Center was created to act as the operating arm for Centro Medico in the planning, financing, and construction of the new hospital and to operate the new facility once it became operational. App. 16a. For purposes of this petition, there is no material distinction between Centro Medico, Turabo Medical Center, and Hospital Interamericano.

maintaining a majority interest.[3] App. 3a, 10a, 56a-57a, 59a. Rodriguez became Chairman of the Board, President, and Chief Executive Officer of Centro Medico. App. 3a, 10a, 56a-57a.

Centro Medico obtained the necessary operational approval from the Puerto Rican Department of Health. App. 3a, 16a. This approval was contingent on San Rafael's surrender of its operating license once the new hospital opened. App. 3a, 16a.[4]

Construction of the new hospital was completed in 1988. App. 3a, 16a. San Rafael closed on November 14, 1988. App. 3a, 18a, 80a. The new hospital, Hospital Interamericano, opened several days later. App. 3a, 17a, 82a.

Rodriguez, Soler, and Badillo continued their ownership interest in Centro Medico, although the ownership of Centro Medico was not identical to the ownership of San Rafael. App. 3a, 10a, 54a-57a. They also served as directors and officers of Centro Medico, with the addition of others. App.

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[3] As of 1981, Soler owned 40 percent of the shares of Centro Medico, Badillo 20 percent, and Rodriguez 20 percent. App. 3a, 56a. Their ownership interests eventually were reduced slightly but not materially. App. 3a, 56a.

[4] Under the circumstances, the Puerto Rican health authorities agreed to allow San Rafael to continue in operation and to waive the deficiencies uncovered in the Medicare inspection. App. 3a, 59a. San Rafael and Centro Medico entered into a number of financial transactions surrounding the surrender of San Rafael's operating license and the acquisition of Centro Medico's license, but San Rafael ultimately went into bankruptcy. App. 3a, 60a-64a.

3a, 10a, 54a-57a. Centro Medico hired 85 of the 102 lower-level supervisors at San Rafael. App. 10a, 69a.

While San Rafael operated a local hospital with just over 100 beds, Centro Medico operated Hospital Interamericano as a 300-bed tertiary care hospital drawing its patients "from a larger area." App. 10a. Most of the equipment used in Hospital Interamericano was purchased new, with only a minimal amount of equipment transferred from San Rafael. App. 10a-11a, 69a. Physicians with privileges at San Rafael could not automatically transfer privileges to Hospital Interamericano, but were required to renew those privileges. App. 11a. There was a "substantial," but not a "complete" identity between the two hospitals. App. 11a.

B. Relevant Collective-Bargaining History and Initial NLRB Litigation.

In January 1984, the Union National de Trabajadores de la Salud, Local 1199 ("the Union") was certified as the collective-bargaining representative of two units of San Rafael employees: a professional unit of registered nurses and pharmacists and a technical unit that included licensed practical nurses. App. 3a, 17a, 74a-75a. San Rafael and the union entered into a collective bargaining agreement governing both units effective from September 1, 1984, to August 31, 1987. App. 3a, 17a, 75a.

The Union sought a new agreement that included Centro Medico within its coverage. App. 4a, 17a. San Rafael indicated that inclusion of Centro Medico within the ambit of the new contract was not proper because the union was certified only to represent San Rafael employees. App. 4a, 76a. San Rafael's position prompted the Union to file unfair

labor practice charges with the NLRB. App. 17a, 36a-37a. The General Counsel of the NLRB issued a complaint that, among other things, alleged that Centro Medico was an alter ego of San Rafael. App. 4a, 37a-38a.

In May 1988, the Union entered into separate settlement agreements with San Rafael and Centro Medico that resolved the pending NLRB litigation. App. 4a, 17a-19a, 38a, 47a-48a. San Rafael agreed to negotiate with the union in good faith. App. 4a, 47a. Centro Medico agreed to hire on a non-discriminatory basis and to employ 95 percent of San Rafael's employees at the new hospital. App. 4a, 48a.

Collective bargaining negotiations between the Union and the two hospitals continued in 1988, but the parties did not reach agreement. App. 4a, 75a-80a. Centro Medico took the position that it was not obligated to recognize and bargain with the Union and that it had the right to change the terms and conditions of employment delineated in the expired collective-bargaining agreement between San Rafael and the Union. App. 5a, 79a-80a.

C. Subsequent NLRB Litigation.

Even before Hospital Interamericano opened, the Union pursued additional recourse with the NLRB against San Rafael and Centro Medico. App. 4a, 38a. In October 1988, the Union filed a petition seeking to set aside its settlement agreement with San Rafael and to reopen its unfair labor practice charges. App. 4a, 38a. The Union subsequently filed additional unfair labor practice charges and again contended that the hospitals were alter egos and had not bargained in good faith. App. 4a, 17a, 39a. The NLRB issued complaint against both hospitals in February 1989.

App. 5a, 39a-40a. In May 1989, an NLRB ALJ conditionally vacated the settlement agreements between the Union and the hospita' and consolidated the old charges with the new charges. App. 5a, 40a-41a. A hearing occurred between May 1989 and May 1990. App. 5a, 43a.[5]

In June 1991, the ALJ found, among other things, that the San Rafael settlement agreement had been entered into in bad faith and set it aside. App. 5a, 18a, 52a-53a, 113a. The ALJ also found that San Rafael and Centro Medico were alter egos. App. 5a, 18a, 67a-70a, 81a-82a, 113a.[6] The

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[5] During the course of the hearing, the Regional Director of the NLRB in Puerto Rico filed in the United States District Court for Puerto Rico a petition for temporary injunctive relief under Section 10(j) of the Act, 29 U.S.C. § 160(j), against Centro Medico seeking, among other things, to require Centro Medico to recognize and bargain with the Union as a successor of San Rafael with respect to the technical unit. App. 5a, 41a-42a, 71a-73a. The district court granted this request for injunctive relief, and the First Circuit affirmed. *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445 (1st Cir. 1990). Neither the request for injunctive relief nor the "successorship" question is before this Court as part of this petition. As the First Circuit stated in the Section 10(j) proceeding, "[n]othing in this opinion should in any way be interpreted as a prejudgment of the merits of the unfair labor practice charges. . . ." (*id.* at 455), and we do not include it in the appendix to the petition.

[6] The ALJ further found that San Rafael and Centro Medico were a "single employer" and that Centro Medico was a "successor" of San Rafael. App. 5a, 18a, 67-70a, 81a-84a, 113a. The ALJ also concluded that Centro Medico had violated Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), by refusing to hire several union members who had been employees of San Rafael. App. 5a, 21a-27a, 84a-99a. As the court of appeals noted below, the alter ego, single employer, and successorship doctrines are "different but related." App. 6a. In alter ego analysis, one employing entity may be regarded as a continuation of the predecessor, and the two are treated interchangeably for purposes of labor laws. App. 6a. The single employer doctrine applies in the case of two ongoing

ALJ's alter ego findings were heavily dependent upon "whether the new company was created to evade responsibilities under the Act," a finding that was "[a] further, and critical, consideration to the finding of alter ego status." App. 68a. (quotation and citation omitted). The ALJ reasoned that the hospitals had acted with unlawful intent because they "were in a position to know all of the facts about their relationship. . . , employed learned and skillful labor counsel during this period. . . and knew or reasonably should have known what the legal effect of that relationship was and is." App. 70a. Because the hospitals "continue[d] to insist that these corporations are, in effect, strangers to each other," the ALJ concluded that Centro Medico was used "as a device to evade responsibilities under the Act." App. 70a.

The ALJ's finding of unlawful employer intent -- in conjunction with other indicia of alter ego status such as ownership, management, supervision, common business purpose, and customer base -- was the linchpin of the ALJ's alter ego determination. App. 18a-19a, 68a-70a. The ALJ concluded that as alter egos the hospitals had violated their duty to bargain in good faith under Section 8(a)(5) of the National Labor Relations Act ("NLRA" or "Act"). App. 5a, 113a-14a.

On review, a three-member Board panel affirmed the reasoning and the finding of the ALJ that the two hospitals

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businesses which may be treated as a single employer because they are owned and operated as a single unit. App. 7a-8a. Finally, the successorship doctrine is generally utilized where a unionized business is acquired by a new owner "unaffiliated with the old one." App. 7a. This petition involves only the alter ego theory, as described above.

were alter egos. App. 6a, 18a-19a. Based upon its alter ego finding, the Board specifically ordered San Rafael and Centro Medico, among other things, to "maintain in full force and effect the 1984-1987 collective-bargaining agreement applicable to both Units A and B until the Respondents and the Union negotiate a new collective-bargaining agreement or the Respondents bargain in good faith to an impasse in accordance with the Act. . . ." App. 27a, 128a. By a 2-1 vote, the Board held that the San Rafael settlement agreement was properly set aside. App. 6a, 18a-19a, 32a-33a.[7]

D. The Decision of the First Circuit.

The NLRB filed an application for enforcement of its order in the United States Court of Appeals for the First Circuit under Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e). The hospitals filed a timely opposition to the enforcement application. App. 6a.

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[7] The Board also affirmed that San Rafael and Centro Medico were a single employer and concluded that the five discriminatees named in the NLRB General Counsel's complaint should be hired by the new hospital. App. 6a, 21a-26a. Single employer status alone, however, does not necessarily bind one employer to the terms of a bargaining agreement entered into by the other employer. *See South Prairie Constr. Co. v. Operating Eng'rs, Local 627 (Peter Kiewit Sons' Co.)*, 425 U.S. 800, 803 (1976) (per curiam). In this case only the finding of an alter ego relationship supports the Board's order requiring Centro Medico to adhere to the terms of the expired agreement. App. 27a. The Board did not reach the question whether Centro Medico was a "successor" of San Rafael. App. 6a, 18a-19a, 27a.

The First Circuit enforced the NLRB order. App. 14a.[8] With respect to the San Rafael settlement agreement, however, the court of appeals rejected the NLRB's conclusion that the agreement was properly set aside. App. 12a. The court found no evidence of bad faith in the execution of the settlement agreement, rejecting the finding that "San Rafael 'should have known' of its prospective alter ego status." App. 11a-12a. The court added that "[t]he two hospitals are not identical in every respect. No mathematical formula determines alter ego status and this case is a close one." App. 12a.

Further, the First Circuit expressed doubt that the Board's order could be enforced on the basis of the single employer doctrine. App. 13a. "The single employer doctrine, as it has developed historically, seems to have little application to this case -- which does not involve two ongoing businesses coordinated by a common master." App. 7a-8a (citations omitted).[9]

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[8] Petitioners do not challenge the First Circuit's decision, order, and judgment concerning the alleged discriminatees. The only question before this Court concerns Centro Medico's status as an "alter ego" of San Rafael and its concomitant obligations to the Union under Section 8(a)(5) of the Act stemming from that status.

[9] In its petition for rehearing, the hospital stressed, among other things, that the NLRB had held recently that the alter ego doctrine was a subset of the single employer doctrine and that, under this recent NLRB jurisprudence, Centro Medico could not be an alter ego of San Rafael in light of the court's conclusion that the two hospitals were not a single employer. *See, e.g., Stardyne, Inc. v. NLRB*, 41 F.3d 141 (3d Cir. 1994); *Gartner-Harf Co.*, 308 NLRB 531, 533 n. 8 (1992). In *Stardyne*, the Third Circuit had ordered a remand on this issue because of the NLRB's failure to address and reconcile "the contradictory case law that it had developed." 41 F.3d at 153. The First Circuit denied the

The court, however, affirmed the Board's conclusion that Centro Medico and San Rafael were alter egos, and, on this basis, enforced the bargaining obligations set forth in the Board's order.[10] App. 8a-11a. In reaching its alter ego conclusion, however, the First Circuit -- departing from the findings of the NLRB -- did *not* rely on the existence of an improper motive in the creation of the new hospital, and rejected any such finding. The court stated as follows:

> [T]he decision of San Rafael's owners to establish a new hospital occurred for financial and operational reasons that have nothing to do with labor relations. The Union did not even exist when the original plans for the new hospital were laid. The Board's claim that Centro Medico's "purpose" was not improper at the outset but became improper simply because Centro Medico declined to bargain makes little sense in the context of

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petition for rehearing without explanation. App. 133a-34a. This Court need not reach the question of the relationship between the single employer and alter ego doctrines on remand in *Stardyne* -- whether the alter ego doctrine is subsumed under the single employer doctrine or whether the two doctrines are conceptually and analytically distinct -- in deciding whether to grant this petition. Nor should the pendency of *Stardyne* on remand materially or adversely affect the Court's decisionmaking concerning this petition. Whether or not intent is required in alter ego cases under the NLRA is a question that will arise regardless of the Board's decision on remand in *Stardyne*, and, as discussed below, is a question of recurring importance regardless of whether the alter ego doctrine is inextricably intertwined with the single employer doctrine or is a separate and independent doctrine.

[10] Despite its ruling on the San Rafael settlement agreement, and, contrary to contentions of the hospitals, the court of appeals concluded that the settlement agreements had no material impact on the Board's other determinations or provisions of the remedial order. App. 12a.

> the alter ego doctrine. After all, *if* the two companies were not alter egos, Centro Medico's desire to resist obligations or liabilities of San Rafael would be understandable. If an improper motive in creating the new entity were a *sine qua non* of the alter ego doctrine, then we think the Board would be hard-pressed to defend its order in this case.

App. 9a (emphasis in the original).

The court concluded, though, that improper motive was not a prerequisite of alter ego status. App. 9a-10a.[11] The court explained that "if a company merely changed its corporate form for legitimate tax or corporate reasons, it is hard to see why the new entity should be able to disregard an existing collective bargaining agreement. . . ." App. 9a.[12]

Resting upon the substantial identity between the two hospitals with respect to "ownership, senior management, supervisory management, employee base, geographic location, and basic business function," the court concluded

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[11] As discussed below, the court's conclusion concerning the role of motive in the alter ego setting was a departure from the universally accepted view of its previous rulings on this issue. *See infra* pp. 18-19. The court went so far as to concede that its previous discussion of the issue "ha[d] given rise to some uncertainty about the court's position on the role of wrongful motive in alter ego cases. . . ." App. 10a.

[12] The court also rested its discussion on dicta in a footnote in *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 259 n. 5 (1979) (citing *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942)). Neither *Southport Petroleum* nor *Howard Johnson* squarely addresses or definitively resolves the intent question presented in this petition, as discussed below.

that the Board was "within reasonable limits" in applying the alter ego doctrine to San Rafael and Centro Medico. App. 11a. It followed from this finding, therefore, that Centro Medico was obligated to recognize and bargain in good faith with the Union and that "it was bound by the collective bargaining agreement to the same extent as San Rafael." App. 12a.

REASONS FOR GRANTING THE PETITION

The First Circuit acknowledges that "[t]his is a difficult labor-law case made even more difficult because the pertinent doctrines have confusing labels, overlap with one another and occasionally mutate." App. 2a. In the absence of clear guidance from this Court, the courts of appeals have developed three distinct approaches to the question and role of intent in alter ego cases. This case presents the Court with an opportunity to resolve the split of authority in the courts of appeals. Moreover, this alter ego question is important to the administration and enforcement of the NLRA and should be settled by this Court. In its decision, the court of appeals erroneously eliminated its previous reliance on employer intent as an indispensable element of alter ego analysis and has saddled Centro Medico not just with preexisting collective bargaining obligations but also with preexisting terms and conditions of employment that cannot be easily altered. The court's ruling, therefore, stringently and impermissibly impedes the full effectuation of a bona fide entrepreneurial corporate transformation that has provided new and materially improved health care services in Puerto Rico.

A. The Decision of the First Circuit Directly Conflicts With Decisions of the Seventh, Eighth, and Ninth Circuits That Require Unlawful Intent as a Prerequisite for the Imposition of Alter Ego Status and Is Also Inconsistent With Decisions of the Fourth Circuit.

The courts of appeals are divided on the proper role of intent in alter ego cases under the NLRA. There are three basic approaches to the question. In conjunction with the First Circuit, the Second, Third, Fifth, Sixth, Tenth, and District of Columbia Circuits agree that intent is relevant but not essential to an alter ego finding. *See, e.g., Goodman Piping Prods. v. NLRB*, 741 F.2d 10, 12 (2d Cir. 1984) (per curiam); *Stardyne, Inc. v. NLRB*, 41 F.3d at 148; *Carpenters, Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 508 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 581 (6th Cir. 1986); *NLRB v. Tricor Prods.*, 636 F.2d 266, 270 (10th Cir. 1980); *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984) (per curiam).

The Seventh, Eighth, and Ninth Circuits have concluded that unlawful employer intent must be present before alter ego status may be imposed. *See, e.g., Trustees of Pension Funds of Local 701 v. Favia Electric Co.*, 995 F.2d 785, 789 (7th Cir. 1993) ("unlawful motive or intent are [sic] necessary for the application of the alter ego doctrine"); *Operating Eng'rs v. Centor Contractors*, 831 F.2d 1309, 1312 (7th Cir. 1987) ("[u]nlawful motive or intent are [sic] critical inquiries in an alter ego analysis"); *Crest Tankers, Inc. v. National Maritime Union*, 796 F.2d 234, 237-38 (8th Cir. 1986) (emphasizing "critical motivational aspects" of the

court's alter ego analysis); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1311 (8th Cir.) ("[u]nlawful motive or intent are [sic] critical inquiries in an alter ego analysis" and finding that one employer "may have been formed specifically to avoid the labor law obligations" of the other, a "consideration that is at the heart of the alter ego inquiry"), *cert. denied*, 469 U.S. 1088 (1984); *Local 343, Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1994 U.S. App. LEXIS 39559 *7 (9th Cir. 1994) ("[t]o prevail on the 'alter ego' theory, appellees were required . . . to prove that North Bay was being used 'in a sham effort to avoid collective bargaining obligations' . . . rather than for the pursuit of legitimate business objectives untainted by 'union animus'") (citations omitted); *A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 519 (9th Cir. 1989) ("[i]n all alter ego determinations an element of fraud or misrepresentation also exists").[13]

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[13] The position of the Eleventh Circuit is not clear. *See generally Road Sprinkler Fitters, Local 669 v. Independent Sprinkler Corp.*, 10 F.3d 1563, 1568 & n.4 (11th Cir.), *cert. denied*, 115 S. Ct. 189 (1994); *ILA, Local 1988 v. Pate Stevedore Co.*, 145 LRRM (BNA) 2275, 2278-79 & n.4 (N.D. Fla. 1993), *aff'd without opinion*, 41 F.3d 668 (11th Cir. 1994). That several of the cases cited above were litigated in the context of Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, involving alleged violations of collective bargaining agreements in no way diminishes the conflict in the circuits concerning the alter ego question. The courts have concluded that alter ego principles developed in the unfair labor practice context apply in Section 301 litigation. *See, e.g., Trustees of Pension Funds of Local 701 v. Favia*, 995 F.2d at 788-89; *Carpenters, Local 1478 v. Stevens*, 743 F.2d 1271, 1279 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985); *Carpenters, Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d at 509-13

The Fourth Circuit has taken yet a third approach to the question, adopting a "reasonably foreseeable benefit" standard that analyzes "whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations." *See, e.g., Alkire v. NLRB*, 716 F.2d 1014, 1020 (4th Cir. 1993).

A close look at the consideration of intent by the Board and the First Circuit in this case illustrates and accentuates the confusion and uncertainty that presently exist concerning the role of intent in alter ego cases. The ALJ expressly stated that "[a] further, and *critical*, consideration to the finding of alter ego status is whether the new company was created to evade responsibilities under the Act." App. 68a (emphasis added) (quotation and citation omitted). His alter ego finding -- which the Board affirmed without extended explanation -- was predicated on his analysis that Centro Medico was a "device to evade responsibilities under the Act." App. 18a-19a, 70a.

Prior to its decision in this case, the First Circuit had stated that "*the critical distinction between single employer*

(stressing "common goals of the LMRA and the NLRA"); *cf. Howard Johnson Co. v. Hotel Employees*, 417 U.S. at 256 ("[i]t would be plainly inconsistent. . . to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under Section 301" and applying successorship principles developed in unfair labor practice cases to Section 301 suit). The relevance of Section 301-alter ego cases is sometimes overlooked when courts of appeals review case law on the intent issue in other circuits. *See, e.g., Stardyne, Inc. v. NLRB*, 41 F.3d at 146-47 n.4 (summarizing position of circuits on intent question). In any event, there can be no question that the courts of appeals have not agreed on the intent question.

and alter ego analysis is the presence or absence of anti-union animus. . . ." *C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 354 (1st Cir. 1990) (emphasis added); *see Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24 (1st Cir.) ("[u]nlawful motive or intent are [sic] critical inquiries in an alter ego analysis"), *cert. denied*, 464 U.S. 892 (1983).[14] Based upon both the Board's decision in this case and the precedent of the First Circuit, the court of appeals should not have found Centro Medico an alter ego of San Rafael in the absence of a finding that Centro Medico was devised as a means of avoiding San Rafael's labor obligations.[15]

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[14] Courts and commentators alike had concluded that the First Circuit had meant what it said and had required unlawful intent to sustain an alter ego finding. *See, e.g., Stardyne, Inc. v. NLRB*, 41 F.3d at 149-50; *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d at 579-80; *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d at 1310-11; *The Developing Labor Law* 194 (Raymond L. Wheeler et al. eds., 3d ed. 1992 & 1st Supp. 1993). Note, *Labor Law's Alter Ego Doctrine: The Role of Employer Motive in Corporate Transformation*, 86 Mich. L. Rev. 1024, 1039 (1988) ("Note").

[15] The First Circuit's decision, objectively construed, substitutes the court's own view of the hospitals' alter ego status for the view expressed by the Board. The court, therefore, failed to adhere to this Court's admonition that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983); *see, e.g., SEC v. Chenery*, 332 U.S. 194, 196 (1947). Regardless of the Board's current general view that intent is just one of a number of relevant factors in an alter ego determination, none of which is controlling (*see, e.g., Kanowsky Furniture, Inc.*, 314 NLRB 107, 110-11 (1994) (ALJD)), the Board did not act according to that principle in this case. The Board's treatment of the intent issue both in general and in this case merits the Court's review.

In sidestepping its prior case law, the First Circuit acknowledged that, at the very least, there was uncertainty "about this court's position on the role of wrongful motive in alter ego cases." App. 10a. The uncertainty enunciated by the First Circuit epitomizes the uncertainty that is prevalent because of the conflict in the courts of appeals. *See also Stardyne, Inc. v. NLRB*, 41 F.3d at 146 (noting that the "[a]pplication of the National Labor Relations Act to cases involving a reorganization of an employer has proven to be vexing" and that the issue of the role of intent in alter ego cases "has yielded no consensus among the courts of appeals that have considered it").[16] This Court should grant the petition to review this division and to eliminate this confusion.

B. Whether Unlawful Intent Is Required as an Element of Alter Ego Status Presents an Important Question of Federal Labor Law That Has Not Been, but Should Be, Settled by This Court.

The alter ego issue in this petition involves fundamental considerations of national labor policy. This Court has stated that "the fundamental premise" of the NLRA is

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[16] As the Third Circuit noted in *Stardyne*, the commentators who have discussed this issue are also divided. *See Stardyne, Inc.*, 41 F.3d at 146-47 n.4. *Compare* Frederick K. Slicker, *A Reconsideration of the Doctrine of Employer Successorship--A Step Toward a Rational Approach*, 57 Minn. L. Rev. 1051, 1064 (1973) (espousing intent standard) *and* Comment, *Bargaining Obligations After Corporate Transformations*, 54 N.Y.U. L. Rev. 624, 638 (1979) (same) *with* Stephen F. Befort, *Labor Law and the Double Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformation*, 67 Wisc. L. Rev. 67, 103-04 (1987) (espousing standard that does not require intent) *and* Note, 86 Mich. L. Rev. at 1056 (same).

"private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). This has been the Act's fundamental premise from its inception. "The theory of the [A]ct is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the [A]ct in itself does not attempt to compel." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937); *see* 29 U.S.C. § 158(d) (Act "does not compel either party to agree to a proposal or to require the making of a concession").

This Court has also recognized that employers must have the flexibility and ability to reorganize and transform their business. The Court has stated, for example, that "an employer has the absolute right to terminate his entire business for any reason." *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965). In an analogous context, the Court has concluded "that the harm likely to be done to an employer's need . . . to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision. . . ." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981).[17]

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[17] In *First National Maintenance*, the Court held that "an economically motivated decision to shut down part of a business" is "*not* part of § 8(d)'s 'terms and conditions' . . . over which Congress has mandated bargaining." 452 U.S. at 680, 686 (emphasis in the original).

In juxtaposition to this backdrop of legitimate employer interests and rights in the alter ego context are employee interests and expectations in maintaining their union's collective bargaining relationship. This Court has grappled with this tension in national labor policy in related contexts. *See, e.g., NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287-88 (1972) (elucidating scope of the "successorship" doctrine that normally obligates the successor to recognize and bargain with the union but not to adhere to the predecessor's contractual obligations); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 551-52 (1964). The Court should act now to resolve this underlying tension in alter ego cases.

The Court has materially discussed the alter ego doctrine under the NLRA and LMRA on only two previous occasions. The Court solidified the foundation of the doctrine in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942). The relevant test was described in general terms: "[w]hether there was a bona fide discontinuance and a true change of ownership. . .or merely a disguised continuance of the old employer." *Id.* at 106. The *Southport* decision, however, did not resolve whether unlawful intent to avoid labor obligations was a necessary predicate of the doctrine.

In *Southport Petroleum*, the Court was faced with a company that had violated the prohibition in Section 8(a)(3) of the Act forbidding discriminatory discharges on the basis of union activity. *See* 315 U.S. at 101-02. After stipulating that it would obey the NLRB's order, the company, three days later, distributed all of its assets to four stockholders who, in turn, conveyed these assets to a newly organized company. *Id.* at 102-03. The stockholders claimed that, in

view of the dissolution of the predecessor company, the Board's remedial order had no effect. *Id.* The only issue before the Court was whether the court of appeals had erroneously denied the organized company the right to introduce evidence concerning the dissolution of the predecessor company. *Id.* at 104. The Court affirmed that the Board's order was appropriately directed to the newly organized company. *Id.* at 106. There was clear unlawful intent in the blatant attempt to avoid the Board order in *Southport Petroleum*, and the Court did not rule -- and had no need to rule -- on the intent question presented in this petition. *Southport Petroleum* did not even involve a potential violation of Section 8(a)(5) and adherence to contractual obligations -- the central issue before the Court in this petition.

The Supreme Court's other treatment of the *alter ego* doctrine occurred in *Howard Johnson Co. v. Hotel Employees*, 417 U.S. at 259 n.5, a decision that the First Circuit relied on heavily below. App. 9a-10a. The court of appeals pounced on the Court's explanation in that case that alter ego cases "involve a mere technical change in the structure or identity of the employing entity, *frequently* to avoid the effect of the labor laws, without any substantial change in its ownership or management." 417 U.S. at 259 n.5; App. 8a (emphasis added). Any intimation that the Court's use of the term "frequently" means that unlawful intent need not be present in alter ego cases is dicta, however. The Court's discussion of the alter ego doctrine occurred *en passant*; the Court's holding concerned the "successorship" doctrine and the principle that, unless there is substantial continuity of the workforce, an asset purchaser was not bound by an agreement to arbitrate under the seller's

collective bargaining agreement. *Id.* at 262-64. Cases such as *Howard Johnson* and *Southport* have served to engender the controversy in the courts of appeals concerning intent and accentuate the need for the Court's careful scrutiny of the issue.

The proper resolution of the intent question and balancing of relevant policy interests has been succinctly articulated by Chief Judge Sloviter of the Third Circuit, who provides the appropriate analytical framework for resolution of this case. When a company is formed for antiunion reasons or to avoid outstanding labor law obligations:

> it is necessary to overlook the corporate technicalities in order to prevent subversion of the NLRA process and frustration of national labor policy. On the other hand, in the absence of evidence of such an unlawful motive, the courts have effectuated the countervailing policy that employers can use their business judgment. . . .

NLRB v. Scott Printing Corp., 612 F.2d 783, 791 (3d Cir. 1979) (Sloviter, C.J., dissenting). Otherwise, a potential employer -- even an employer that may share a substantial identity with a predecessor employer -- may be unwilling to put time, money, and resources into saving "a moribund business." And saving that business may entail "changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision." *NLRB v. Burns International Security Services, Inc.*, 406 U.S. at 287-88.

There can be no question in this case but that San Rafael was "a moribund business." The "transfer of capital" (*id.*) that made Hospital Interamericano a reality was not designed

to avoid San Rafael's collective bargaining obligations with the union; it had nothing to do with the union, as the First Circuit properly recognized. App. 9a. Under these circumstances, the alter ego doctrine -- an equitable doctrine[18] -- should not be applied as a matter of federal labor law to inhibit a company whose purpose is not to evade preexisting collective bargaining obligations. The Court should review this legal question of great practical importance in federal labor law and rectify this unfair result.[19]

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[18] Distilled to its essence, the alter ego doctrine centers around the disregard of corporate form. This Court has stated that "the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when so to do would work fraud or injustice." *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939). The alter ego doctrine has been fashioned to ensure that corporate form does not override the federal legislative policies set forth in the NLRA. It is particularly appropriate for this Court to decide when federal labor law policies requiring adherence to contractual obligations supersede adherence to corporate form.

[19] As the First Circuit suggested, the alter ego doctrine comes into play in a wide variety of traditional labor law controversies under the NLRA and LMRA, including "jurisdictional aggregation, maintenance of parallel union and non-union businesses," and, most relevant to the question before the Court, "inherited contractual obligations." App. 7a. *See generally* Note, 86 Mich. L. Rev. at 1027 n.14 (discussing recent increasing "activity. . . and importance" of alter ego cases).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MAY 1995

APPENDIX

APPENDIX A

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

HOSPITAL SAN RAFAEL, INC., and Centro Medico Del Turabo, Inc., and Its Subsidiaries, Turabo Medical Center Limited Partnership and Hospital Interamericano De Medicina Avanzada, Respondents.

No. 93-2026

United States Court of Appeals,
First Circuit

42 F.3d 45; 1994 U.S. App. LEXIS 34716

Heard April 5, 1994.
Decided December 12, 1994.

David A. Grant with whom Betty Southard Murphy, Jean H. Baker, Baker & Hostetler, Washington, DC, Heber E. Lugo-Rigau and Ledesma, Palou & Miranda, Hato Rey, PR, were on brief for respondents.

Fred L. Cornnell with whom Frederick C. Havard, Supervisory Atty., Daniel Silverman, General Counsel, Linda Sher, Acting Associate General Counsel, and Aileen A. Armstrong, Deputy Associate General Counsel, N.L.R.B., Washington, DC, were on brief for petitioner.

BEFORE BREYER,* Chief Judge, BOUDIN and STAHL, Circuit Judges.

BOUDIN, Circuit Judge.

This is a difficult labor-law case made even more difficult because the pertinent doctrines have confusing labels, overlap with one another and occasionally mutate. We begin with the facts and procedural history, and then address the legal issues and the claims of error.

I.

For many years, Hospital San Rafael, Inc., ("San Rafael") operated a neighborhood hospital in Caguas, Puerto Rico. In 1978, two doctors--Jaime Soler and Jose Badillo--bought somewhat over 80 percent of San Rafael's stock; Soler owned about 70 percent of the joint holdings and Badillo about 30 percent. The doctors then hired Joaquin Rodriguez as the hospital's president. These three individuals comprised the hospital's board.

San Rafael was in poor financial shape, and in mid 1978 the Puerto Rico health authorities said that the hospital would have to remedy problems in its physical plant or lose its eligibility to treat Medicare patients. Medicare patients accounted for almost half of the hospital's occupancy. Soler, Badillo and Rodriguez began to discuss the construction of a new hospital. It was conceived that a new corporation would be established, partly because San Rafael itself could not obtain loan funds, and in addition the new hospital was expected to be more than a local hospital and to draw patients from the Caribbean basin.

Centro Medico was created in August 1978 to operate the proposed new hospital under the name Hospital Interamericano de

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*Chief Judge Stephen Breyer heard oral argument in this matter, but did not participate in the drafting or the issuance of the panel's opinion. The remaining two panelists therefore issue this opinion pursuant to 28 U.S.C. § 46(d).

Medicina Avanzada ("Hospital Interamericano"). In 1981, Soler had 40 percent of the shares, Badillo 20 percent and Rodriguez 20 percent. Ultimately, Soler's ownership was reduced to 38 percent, Badillo and Rodriguez each owned about 19 percent, and 19 percent was acquired by Carlos Pineiro, a longtime associate of Rodriguez. From the start Rodriguez was Centro Medico's president, and Soler and Badillo were among the board members.

At various times, Rodriguez spoke about the new hospital as if it were an expansion of San Rafael, and San Rafael made interest-free cash advances for the construction of the new hospital and took other steps to support its development. San Rafael was granted a waiver as to its Medicare deficiencies because of the plans to open a new hospital. Later, San Rafael agreed to surrender its own license to operate a hospital, in order to facilitate the licensing of the new hospital.

San Rafael ceased operation on November 14, 1988. On November 18, 1988, the new Centro Medico hospital, operating as Hospital Interamericano, opened to the public. Rodriguez, Soler and Badillo continued to hold their prior positions. Pineiro, who since 1987 had been responsible for labor relations at San Rafael, became the new hospital's executive vice president. A majority of the supervisors of San Rafael and most of the other employees transferred to the new hospital.

Against this background labor disputes developed that led to the present litigation. In January 1984, the Union Nacional de Trabajadores de la Salud, Local 1199 ("the union") became the certified collective bargaining representative of two units of San Rafael employees: a professional unit (e.g., registered nurses) and a technical unit that included other employees. San Rafael and the union entered into an agreement effective from September 1, 1984, to August 31, 1987, also agreeing that this contract would continue until a new contract replaced it.

San Rafael employee Milton Suarez had been a leader in the organization of the union and had been discharged for his organizing activities, although later reinstated. Suarez helped negotiate the September 1984 contract and became the union's chief steward. In 1985, Suarez began to question San Rafael about the effect that the planned new hospital would have on job security. On August 30, 1985, Rodriguez issued a memorandum to San Rafael employees stating "on behalf of Hospital San Rafael and of Centro Medico del Turabo" that the employees would be "transferred" with the same salary and benefits to the new hospital.

In May 1987, the union sought to begin negotiations for a new contract and proposed an agreement naming both San Rafael and Centro Medico as parties. San Rafael indicated that Centro Medico would not recognize or bargain with the union because it was certified only to represent San Rafael employees. The National Labor Relations Board (the "Board" or "NLRB") issued a complaint charging that San Rafael and Centro Medico were a single employer and alter egos, and had unlawfully refused to bargain with the union over the inclusion of Centro Medico.

The union reached separate settlement agreements with San Rafael and Centro Medico in May 1988. San Rafael agreed to negotiate in good faith with the union, and Centro Medico promised to hire on a nondiscriminatory basis and to retain 95 percent of San Rafael's employees to work at the new hospital; Centro Medico stipulated that it was not thereby agreeing to recognize the union. The union, in exchange for the settlements, withdrew its unfair labor practice charges, and the NLRB then withdrew the complaint.

Negotiations between the union and the two hospitals did not prove fruitful. In October 1988, the union filed a petition with the NLRB seeking to have the settlement agreements set aside, and the pre-agreement unfair labor practice charges reopened, because San

Rafael had not complied with the settlement agreement. In August 1989, the district court granted a preliminary injunction requiring Centro Medico to bargain in good faith, and this court affirmed. *See Asseo v. Centro Medico Del Turabo, Inc.*, 900 F.2d 445 (1st Cir. 1991).

From the outset in 1988, the new Centro Medico hospital claimed that it was free to alter working conditions at will and that it need not recognize the union. Although most San Rafael employees were hired by the new hospital, Suarez was not. Neither were four other employees who had been closely connected with union activities and acted at one time or another as union stewards. In these five cases the new hospital did not formally refuse to hire the employees; several were told that their applications were under review, but Centro Medico then took no official action on the applications.

In December 1989, the union filed new unfair labor practice charges. These included charges that both hospitals had failed to bargain in good faith and had engaged in unfair labor practices by refusing to hire the five union-related employees. A Board complaint was filed in February 1989. On May 4, 1989, an administrative law judge entered an order conditionally setting aside the settlement agreements, reinstating the old charges and consolidating them with new ones. Hearings were held between May 1989 and May 1990.

On June 19, 1991, the ALJ found that San Rafael and Centro Medico were alter egos and comprised a single employer; alternatively, Centro Medico was found to be a successor employer to San Rafael. The ALJ found that the San Rafael settlement agreement had been entered into in bad faith and should be permanently set aside. The ALJ also found that the hospitals had violated their duty to bargain, 29 U.S.C. § 158(a)(5), and Centro Medico's failure to hire four of the five employees was also found to be wrongful. Id. § 158(a)(3).

On review, the Board, acting through three members, found that the two hospitals were a single employer and alter egos but did not reach the successor-employer issue. The Board agreed with the ALJ that the hospitals had improperly failed to bargain with the union and that Centro Medico had unilaterally changed employee working conditions. Failure to rehire all five employees was found to be improper. By a divided vote, the Board held that the San Rafael settlement agreement was properly set aside.

The Board entered a remedial order containing specific provisions designed to compel Centro Medico to bargain and to provide redress for the five employees. The Board order also broadly forbade future infringement of worker rights protected under "section 7." 29 U.S.C. § 157. The Board then filed in this court the present application to enforce its order. 29 U.S.C. § 160(e). The hospitals opposed the application.

II.

In this court, the main issue raised by the hospitals is whether San Rafael and Centro Medico can be treated for present purposes as if they were one entity. This issue is critical because the only signed collective bargaining agreement is between the union and San Rafael. Centro Medico is required to respect that agreement, and bargain before making unilateral changes in working conditions, only if Centro Medico is an extension of San Rafael. We therefore begin by describing three different but related labor-law doctrines considered by the agency.

One concept, known colloquially as the alter ego doctrine, says that in certain situations one employer entity will be regarded as a continuation of a predecessor, and the two will be treated interchangeably for purposes of applying labor laws. The easiest example is a case where the second entity is created by the owners of the first for the *purpose* of evading labor law responsibilities; but identity of ownership, management, work force, business and

the like are also relevant. *See C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350 (1st Cir. 1990).

A second rubric--the "single employer" doctrine--has its primary office in the case of two ongoing businesses which the NLRB wishes to treat as a single employer on the ground that they are owned and operated as a single unit. *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir.), *cert. denied*, 464 U.S. 892, 104 S. Ct. 237, 78 L. Ed. 2d 228 (1983). Most of the alter ego criteria remain relevant but motive is normally considered irrelevant. The consequences of single employer and alter ego status are not necessarily the same. *See C.E.K.*, 921 F.2d at 354.

A final, narrower doctrine applies to so-called "successor" companies. Where, for example, a unionized business is acquired by a new owner unaffiliated with the old one, the new employer may not be bound by a collective bargaining agreement with the old one. *See NLRB v. Burns Sec. Servs.*, 406 U.S. 272, 92 S. Ct. 1571, 32 L. Ed. 2d 61 (1972). But where enough continuity exists in the business and work force, the new owner may, without any new certification, be required to treat the union as the recognized bargaining agent. *E.g.*, *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987).

This overview of the three doctrines imparts to them a neatness that is not borne out by the circuit caselaw or even the Board's decisions. *See, e.g.*, 4 T. Kheel, *Labor Law* § 17.02 (1994). In part, the difficulty is that several related and similarly named concepts are being used to address different controversies (*e.g.*, jurisdictional aggregation, maintenance of parallel union and non-union businesses, inherited liability for past misconduct, inherited contractual obligations, carry-over obligation to bargain, etc.).

In all events, the Board's order here in dispute can be sustained on the alter ego theory. The single employer doctrine, as it has developed historically, seems to have little application to this case--which does not involve two ongoing businesses coordinated

by a common master. *See A. Dariano & Sons, Inc. v. District Council of Painters*, 869 F.2d 514, 519 (9th Cir. 1989); *International Union of Operating Eng'rs v. Centor Contractors, Inc.*, 831 F.2d 1309, 1313 n.2 (7th Cir. 1987). As for "successor" status, any relief available under this theory would be less far reaching than that based on the alter ego theory.

In determining alter ego status, the NLRB and the courts have, as noted in *C.E.K.*, considered a range of criteria including the similarity between the old and new companies in relation to management, business purpose, operation, equipment, customers and supervision, as well as ownership. In most cases, a further important factor in determining alter ego status is whether the alleged alter ego entity was created and maintained in order to avoid labor obligations. In a rare discussion of the doctrine, the Supreme Court said:

> It is important to emphasize that this is not a case where the successor corporation is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 [62 S. Ct. 452, 456, 86 L. Ed. 718] (1942). Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor.

Howard Johnson Co. v. Hotel Employees, 417 U.S. 249, 259 n. 5, 94 S. Ct. 2236, 2242 n. 5, 41 L. Ed. 2d 46 (1974).

Howard Johnson supplies an animating purpose for the alter ego doctrine, and also helps sort out the relationship between subjective motive and objective criteria. Motive matters, we think,

because a corporate transfer or transformation for the *purpose* of avoiding labor law obligations is an unsympathetic case for respecting the formal alteration, and faced with a subterfuge--*e.g.*, a sham transfer of assets--the courts reasonably need give less weight to the other "identity" criteria. *See Penntech Papers*, 706 F.2d at 24.

But in our own case the decision of San Rafael's owners to establish a new hospital occurred for financial and operational reasons that have nothing to do with labor relations. The union did not even exist when the original plans for the new hospital were laid. The Board's claim that Centro Medico's "purpose" was not improper at the outset but became improper simply because Centro Medico declined to bargain makes little sense in the context of the alter ego doctrine. After all, *if* the two companies were not alter egos, Centro Medico's desire to resist obligations or liabilities of San Rafael would be understandable. If an improper motive in creating the new entity were a *sine qua non* of the alter ego doctrine, then we think the Board would be hard-pressed to defend its order in this case.

In *Howard Johnson*, however, the Supreme Court said that wrongful motive is "frequently" present in the alter ego cases; it did not say "always." Similarly, we have said that "[n]o one factor is controlling, and all need not be present to support a finding of 'alter ego status.'" *C.E.K.*, 921 F.2d at 354. After all, if a company merely changed its corporate form for legitimate tax or corporate reasons, it is hard to see why the new entity should be able to disregard an existing collective bargaining agreement or claim immunity when told to reinstate a worker wrongly fired by the old one. This view--that a wrongful motive is not required--is

shared by most other circuits. *See* Note, 86 *Mich. L. Rev.* 1024, 1045 (1988) (collecting cases).[1]

The problem here, as so often with similar concepts, is in how far to carry the notion of "disguised continuance," *Howard Johnson*, 417 U.S. at 249 n. 5, 94 S. Ct. at 2242 n. 5, where there is *substantial* continuity but also *some* limited change in ownership and operations. Continuity of ownership, perhaps the most important predicate, does exist in this case. Soler and Badillo owned 87 percent of the stock in San Rafael; and the same individuals came to own about 60 percent of the stock in Centro Medico, their proportionate shares *inter se* remaining the same. The two other important stockholders of Centro Medico, Rodriguez and Pineiro, were closely associated with San Rafael.

Other criteria of identity point in the same direction. In upper management, Rodriguez served as president both of San Rafael and Centro Medico. Soler, Badillo, Rodriguez and Pineiro were directors, officers or both in each of the two entities. The ALJ found that about 85 of the 102 lower level supervisors at the new hospital had also been supervisors at the old one. The new hospital agreed to hire 95 percent or more of the old hospital's employees and the ALJ said that this had occurred.

The two hospitals are in the same business and operate in the same community. It is true that Centro Medico operates a 300-bed tertiary care hospital and presumably draws from a larger area; San Rafael was a local hospital with just over 100 beds. Little of

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[1] Since our discussion in *Penntech* and *C.E.K.* has given rise to some uncertainty about this court's position on the role of wrongful motive in alter ego cases, this opinion has been circulated prior to filing to all active judges of this court, and no member of the court expressed disagreement with the panel's treatment of the issue. This informal circulation is without prejudice to a petition for rehearing or suggestion of en banc reconsideration on any issue in the case. *See Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1, 9 n. 5 (1st Cir. 1992).

the equipment was transferred from one to the other and doctors' privileges had to be renewed. But San Rafael effectively planned the new hospital, helped finance it, and surrendered its license so the new one could obtain a license. Both in origin and function, the new hospital is essentially an enlargement of the old one.

Thus, a substantial--not a complete--identity exists between the two hospitals along every axis: ownership, senior management, supervisory management, employee base, geographic location and basic business function. The alter ego doctrine has been devised by the Board with approval of the courts, and the agency is entitled to a reasonable latitude in applying its own doctrine. *See generally Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271 (1941). Whether the alter ego doctrine can be stretched much beyond the present facts may be open to debate, but this case is within reasonable limits.

Next, San Rafael claims that the Board was not warranted in setting aside the May 19, 1988, settlement agreement between the union and San Rafael. In prior cases, the Board has set aside settlements where the settlement agreement has been materially breached and the party responsible entered into the agreement in bad faith without an intention to carry out its commitments. *E.g., Norris Concrete Materials*, 282 N.L.R.B. 289 (1986). In this case, the ALJ set the settlement agreement aside on the ground that San Rafael entered into it in bad faith and then breached the agreement. The Board sustained this determination by a two-to-one vote, one member dissenting on this issue alone.

We review the findings of the Board only to determine whether they are supported by substantial evidence. 29 U.S.C. § 160(e). The ALJ, whose rationale was adopted in a condensed form by the Board majority, said that the two hospitals had to know of their own internal relationship and therefore, knew or should have known their legal status as alter egos; that the promise by San Rafael to bargain in good faith therefore included a commitment

to bargain on behalf of Centro Medico; and that because San Rafael resisted that obligation it must never have meant to carry out this attributed commitment.

We think that this reasoning is unpersuasive and that no other evidence shows that the agreement was entered into in bad faith. There is proof that San Rafael knew that it had a duty to bargain for Centro Medico. The ALJ said that San Rafael "should have known" of its prospective alter ego status, but we do not see why. The two hospitals are not identical in every respect, no mathematical formula determines alter ego status, and this case is a close one. Bad faith is more than mere negligence. *See Voccio v. Reliance Ins. Cos.*, 703 F.2d 1, 2 (1st Cir. 1983). The Board's brief hints that bad faith may not be required, but bad faith was the only basis given in this case. *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S. Ct. 454, 459, 87 L. Ed. 626 (1943).

However, there is no showing by the hospitals that the setting aside of the settlement agreement had any effect on the Board's other determinations or on any of the provisions of its remedial order. Conduct occurring *after* the settlement agreement was the subject of new unfair labor practice charges in December 1988. These included both failure to bargain and discrimination against union members. These charges are amply supported by the record even if only conduct after May 1988 is the focus of consideration.

On the failure to bargain charge, Centro Medico persistently refused to recognize the union and, shortly after the new hospital opened, it made unilateral changes in the employees' working conditions without attempting to bargain. Since we have upheld the alter ego theory advanced by the Board, we think that it follows that Centro Medico was obligated to recognize and bargain with the union; that it was bound by the collective bargaining agreement to the same extent as San Rafael; and that it was subject to the ordinary obligations of an employer with a union contract to negotiate about changes. Good faith is not generally a defense

to such charges. *ILGWU v. NLRB*, 366 U.S. 731, 738-40, 81 S. Ct. 1603, 1607-09, 6 L. Ed. 2d 762 (1961); *NLRB v. Cooke & Jones, Inc.*, 339 F.2d 580, 581 (1st Cir. 1964).

The Board also had ample evidence for its finding that the five named union members not rehired were the subject of anti-union discrimination by Centro Medico. It is sufficient to say that all five employees were identified with the union, no persuasive reason appears why any of them was so refused a position at the new hospital, and the excuses or evasions practiced by Centro Medico in dealing with each of the five affirmatively suggests that discrimination was being practiced. The Board and administrative law judge decisions adequately set forth the circumstances.

We turn now to remedy. The treatment of the five employees was egregious enough to justify the Board's broad remedial direction that the hospitals cease and desist from infringing "in any other manner" on employees' section 7 rights. The hospitals say that a proper order would merely prohibit Centro Medico from acting "in any like or related manner," but the broader version--carrying with it the risk of contempt sanctions--has been found proper where the employer's violations are either repeated or egregious. *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 146-47 (1st Cir. 1985). None of the other remedial provisions are challenged, and each other remedy appears justified by post-settlement misconduct by the hospitals.

III.

To sum up, we agree with the hospitals that the bad faith finding as to the May 1988 settlement and the setting aside of the San Rafael settlement agreement are not supported. We are also doubtful whether the "single employer" doctrine could be a basis for sustaining the Board's order. But the alter ego doctrine reasonably applies; the unfair labor practice findings are adequately supported by the post-settlement misconduct; and the

remedies ordered are within the Board's discretion. Accordingly, we enforce the Board's order as written.

It is so ordered.

APPENDIX B

HOSPITAL SAN RAFAEL, INC.; and Centro Medico del Turabo, Inc. and Joaquin Rodriguez d/b/a Turabo Medical Center Limited Partnership d/b/a Hospital Interamericano de Medicina Avanzada, *and* Union Nacional de Trabajadores de la Salud, 1199, affiliated with National Union of Hospital and Health Care Employees, AFL-CIO

Centro Medico del Turabo, Inc. and Joaquin Rodriguez d/b/a Turabo Medical Center Limited Partnership d/b/a Hospital Interamericano de Medicina Avanzada; *and* Caribe Hospital Affiliates, Inc. and Union Nacional de Trabajadores de la Salud, 1199, affiliated with National Union of Hospital and Health Care Employees, AFL-CIO.

Cases 24-CA-5646, 24-CA-5722, 24-CA-5886, 24-CA-5889, 24-CA-5949, and 24-CA-6030

August 31, 1992

NATIONAL LABOR RELATIONS BOARD

308 N.L.R.B. 605; 1992 NLRB LEXIS 1038; 142 L.R.R.M. 1157; 1992 NLRB Dec. (CCH) 17456; 308 NLRB No. 86

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On June 19, 1991, Administrative Law Judge George F. McInerny issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions, and the Respondents filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondents' exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified and as set forth in full below.

As more fully discussed in the judge's decision, Respondent Hospital San Rafael, Inc. (HSR) operated a general hospital in Caguas, Puerto Rico, from approximately 1933 until November 14, 1988. In 1978, HSR was experiencing significant financial problems and was unable to comply with certain medicare requirements, mainly because of an antiquated physical facility. In view of these difficulties, the principals of HSR decided to build an entirely new hospital facility.

In August 1978, Respondent Centro Medico del Turabo, Inc. (CMT) was organized to plan and eventually to build a new facility to replace the facility operated by HSR. In 1980, Respondent Turabo Medical Center Limited Partnership (TMCLP) was established to act as CMT's operating arm in the planning, financing, and construction of this new facility, and to operate the new facility once it opened for business. In 1983, after CMT obtained the requisite permission from the department of health in Puerto Rico, HSR agreed to surrender its operating license for the existing facility on CMT's opening the new facility. Construction on this new facility, later known as Hospital Interamericano de Medicina Avanzada (HIMA), was eventually completed in 1988. At that time, Respondent Caribe Hospital Affiliates, Inc. (CHA)

was contracted to manage the day-to-day operations of Respondent HIMA.

Throughout this 10-year period, day-to-day operations at HSR were maintained. On November 19, 1988, 5 days after the HSR facility closed, HIMA opened for business.

Since January 30, 1984, the Union Nacional de Trabajadores de la Salud, 1199, has been the certified collective-bargaining representative of two separate units of HSR employees: a professional-employees unit of registered nurses and pharmacists and a technical-employees unit which includes licensed practical nurses. Following certification, the Union and HSR negotiated a collective-bargaining agreement for both units effective from September 1, 1984, to August 31, 1987. Article XXIII, section 3, of this agreement provides that the contract "will remain in full force and effect until the promulgation of a new Agreement." In May 1987 both the Union and HSR requested negotiations for a successor contract. On July 20, 1987, the Union submitted bargaining proposals that included CMT in the new contract's coverage. HSR refused to negotiate and insisted on the deletion of CMT from the Union's contract proposals.

The Union filed several unfair labor practice charges alleging, inter alia, that HSR refused to bargain in good faith during the 1987 contract negotiations. On May 19, 1988, these charges were settled. The Union withdrew them, but their withdrawal was conditioned on the Respondents' compliance with two written non-Board settlement agreements. One of these documents was signed by the Union and HSR, and the other document was signed by the Union and CMT. Thereafter, both the Union and the General Counsel requested that the previously withdrawn charges be reinstated and consolidated with charges filed by the Union against the Respondents after May 19, 1988. The new charges alleged further violations of Section 8(a)(1), (3), and (5) by the Respondents.

The judge found that HSR and CMT[1] constitute a single employer and are alter egos, and, alternatively, found that CMT is a successor employer to HSR. In light of his single employer and alter ego findings, the judge set aside paragraphs 1, 2, and 3 of the May 19, 1988 non-Board settlement agreement with the Union signed by HSR, and he reinstated the corresponding portions of the previously withdrawn charges and complaints alleging that HSR had refused to bargain in good faith during the 1987 contract negotiations with the Union. We agree with the judge's determination that the evidence establishes both single employer and alter ego status for the Respondents[2] and that it warrants partially setting aside the settlement agreement as he sets forth.[3] For this reason, we find it unnecessary to pass on the

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[1] The judge found that CMT was and is doing business as TMCLP, which in turn does business as HIMA. In addition, the judge found that CHA (which manages HIMA) is a joint employer with CMT and its subsidiaries TMCLP and HIMA. There were no exceptions to these findings.

[2] We do not rely on the judge's finding in fn. 31 of his decision that HSR and CMT were not actual employers at the same time. Contrary to the judge, the record reveals that CMT was in existence and operating over a significant period of time before HSR officially closed for business on November 14, 1988. In mid-1988, CMT began its hiring process for HIMA employees by distributing job applications and by interviewing and screening prospective applicants. In addition, the transition of operations from HSR to HIMA commenced November 13, 1988, as found by the judge.

[3] We disavow the judge's reliance on *Auto Bus, Inc.*, 293 NLRB 855 (1989), and *NLRB v. Northern California District Council*, 389 F.2d 721 (9th Cir. 1968), because those cases are not germane to the settlement agreement issues under consideration here.

In refusing to vacate the non-Board settlement agreement executed by HSR, our dissenting colleague ignores the judge's underlying findings which, in our view, are clearly supported by the record. As the creation of HSR, CMT came into existence long before the non-Board settlement was reached, and it operated, at all times during that 10-year period, to achieve a new facility to replace the HSR facility. As found by the judge, CMT and HSR knew that they had common ownership, common management, common supervision, common

judge's alternative successorship findings, conclusions, and proposed remedy.[4]

The judge found numerous violations of Section 8(a)(5) and (1) of the Act committed by the Respondents. He found that HSR had unlawfully insisted on the deletion of CMT's name from the Union's 1987 bargaining proposals and on the exclusion of CMT from the 1987 bargaining process. He also found violative the January 14, 1988 statement by Felix Ortiz Collazo, then director of human resources and industrial relations at HSR, indicating that the Respondents would no longer recognize the Union and adhere to their last contract with the Union. The judge found another

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business purpose and customer base, and shared control of labor relations. As the judge also found, "CMT continuously and adamantly refused to admit its relationship with HSR to the Union." The Respondents' action in this regard provide further support for the judge's finding, which we adopt, that HSR never intended to comply with the settlement agreement by bargaining in good faith, because it never intended to bargain with the Union on behalf of CMT.

Contrary to our colleague, the Union's having signed separate settlement agreements with HSR and CMT, covering different subjects, and the fact that CMT was not fully operational until months later, do not require a different result. Clearly, given the Respondents' continuing efforts to appear to be unrelated enterprises, their signing separate agreements can hardly be taken as positive evidence of their good faith. That CMT had not begun treating patients at the time the settlement agreements were concluded is neither here nor there; as the thinly disguised continuance of HSR, CMT did not have to be fully operational to be HSR's alter ego. *See, e.g., Magnet Coal, Inc.*, 307 NLRB 444 (1992). HSR thus had a duty to bargain for CMT, to the extent meaningful bargaining could take place, even though CMT had not yet become fully operational. In these circumstances, we are unwilling to allow this hospital entity, whether the Respondents use the name HSR or CMT, to escape the bargaining obligations flowing from their single employer/alter ego status.

[4] Consistent with our adoption of the judge's single employer and alter ego findings, we shall order the Respondents to recognize and bargain with the Union concerning both the professional employees unit (unit A) and the technical employees union (unit B). Contrary to the judge, we do not find that the General Counsel or the Union ever abandoned their contention that unit A is represented by the Union.

violation of Section 8(a)(5) occurred after the execution of the May 19, 1988 settlement agreements when the Respondents refused to bargain further on September 14, 1988, unless the Union agreed to a contract clause limiting the scope of the successor contract to HSR and excluding CMT from its coverage. The judge found additional 8(a)(5) violations committed on various dates between October 25, 1988, and January 5, 1989, in connection with the Respondents' refusal to recognize the Union as the exclusive bargaining representative for employees working at the new hospital facility. Finally, the judge found that the Respondents unilaterally changed wages, hours, and working conditions of unit employees in violation of Section 8(a)(5).[5] For the reasons given by the judge, we adopt all these findings.

The judge also found that the Respondents, in response to the Union's bargaining demands following the August 8, 1989 order of the district court, violated Section 8(a)(5) and (1) by (1) initially refusing to bargain because they intended to appeal the court order; (2) refusing to meet after August 24, 1989, until the Union submitted a full contract proposal; and (3) displaying an intent to delay negotiations through the totality of their conduct from August 10 through October 10, 1989. Relying on the judge's first and second grounds only, we find that the Respondents unlawfully refused to bargain with the Union after August 8, 1989.[6]

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[5] The General Counsel requests that the Board modify the judge's remedy to include an order not only requiring the Respondents to rescind the unilateral changes but also to abide by its prior 1984-1987 collective-bargaining agreement with the Union, which contained an automatic renewal clause. We have included this modification in our Order because we agree that the record shows that the Respondents also failed to honor the 1984-1987 agreement which, by its own terms, remains effective until a successor contract is reached. *See McAllister Bros.*, 278 NLRB 601 (1986).

[6] Because we view the judge's remaining ground as cumulative, we find it unnecessary to pass on it.

We now turn to the 8(a)(3) allegations. Five known union supporters --Milton Suarez, Carmen Merced, Isabel Arriaga,[7] Norma Flores, and Delia Diaz --applied for various jobs at HIMA prior to its opening for business on November 19, 1988. All five individuals had been long-term employees of HSR, and each one was denied employment at HIMA by Arelis Veintidos, the assistant director of human resources at HIMA. The judge found violations of Section 8(a)(3) and (1) with respect to Suarez, Merced, Arriaga, and Flores, but dismissed a similar allegation pertaining to Diaz. The Respondent and the Charging Party filed exceptions. For the reasons discussed below, we adopt the judge's findings of 8(a)(3) violations, but we reverse his dismissal of the Diaz allegation.

In *Wright Line*,[8] the Board set forth its causation test for cases alleging violations of the Act which turn on employer motivation. The General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. The burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. In rebutting the General Counsel's case, the employer cannot simply present a legitimate reason for its action, but must also persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Roure Bertrand Dupont*, Inc., 271 NLRB 443 (1984).

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[7] The Respondents except to the judge's finding that Isabel Arriaga was a union delegate. Whether Arriaga actually served as a union delegate is not significant since information supplied to the Respondents in the Union's letter dated April 13, 1987 (G.C. Exh. 97), indicates that Arriaga had delegate status. Moreover, the record shows that Arriaga engaged in other open union activity which is described in sec. III,D,5,B of the judge's decision.

[8] 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). This case was approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Applying the principles of *Wright Line*, we adopt the judge's findings that Suarez, Merced, Arriaga, and Flores were unlawfully denied employment at HIMA because of their union activities. The General Counsel made the requisite prima facie showing that the Respondents' actions were motivated by unlawful considerations. As found by the judge, the Respondents' antiunion animus was manifested in several different ways, including their maintaining a facade of two separate entities, designed, at least in part, to impede union representation at HIMA. Relying on this strong evidence of antiunion animus, the judge found that the hiring process for HSR employees was a sham and that the "Verification of Employment References" forms[9] assertedly used by Veintidos as the sole basis for her hiring decisions at HIMA were not the sole criterion for hire. He further found that the verification forms were poorly prepared, were incomplete in critical areas, and failed to explain ambiguous and unintelligible remarks about the individual employee's work history which were never clarified by Veintidos. In this regard, Veintidos admittedly never investigated nor inquired about any of the incidents, discipline, and comments described in the verification forms. In addition, Veintidos was unable to explain satisfactorily why she had rejected Suarez, Merced, Arriaga, and Flores while hiring other applicants whose verification forms contained examples of similar work deficiencies and discipline. In these circumstances, the judge found that the asserted reasons for the denial of employment at HIMA to Suarez, Merced, Arriaga, and Flores were pretextual and that these employees were denied employment because of their union activities at HSR, which were known by Veintidos.

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[9] The form was a one-page document to be complied by the applicant's previous employer and then submitted to HIMA. The form focused on obtaining information pertaining to the applicant's employment history (e.g., attendance record, discipline, and commendations) of the prior 2 years.

We further find that the Respondents have failed to demonstrate that they would have taken the same action against Suarez, Merced, Arriaga, and Flores in the absence of their union activity. In their exceptions, the Respondents renew their assertion that the verification forms were the sole criterion used[10] and that they justify Veintidos' decision not to hire these employees. In this respect, they argue that Flores, Merced, and Suarez had serious absenteeism problems and were disciplined for such conduct and that Merced had also been disloyal by telling patients that she would not want to be hospitalized at HSR. We, however, observe, as did the judge, that other job applicants were hired or remained employed by the Respondents notwithstanding similarly poor work records reflected by their verification forms, yet Veintidos was unable to explain satisfactorily the reason for the apparent disparate treatment.[11]

With respect to Arriaga, the Respondents also contend that her professional competence as a registered nurse is questionable because she was disciplined for altering patient records.[12] We also reject this explanation. The record shows that before Arriaga

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[10] In view of this assertion, we find that whatever other information about the applicant's employment record the Respondents may have possessed was not a factor in HIMA's hiring considerations.

[11] In addition, the Respondents contend that Flores and Merced would have been rejected in any event because they had applied only for positions which had existed at HSR but did not exist at HIMA. The judge rejected this contention. We agree. As found by the judge, Veintidos never informed Flores and Merced that they were seeking nonexistent positions nor did she apprise them of other available registered nurse positions at HIMA.

[12] The Respondents claim that Arriaga also forgot to give a blood transfusion to a patient in June 1988, an incident not described in Arriaga's verification form. We find that Veintidos, who testified that she relied solely on the applicant's verification form for information about the applicant, was not aware of this purported incident when she decided to effectively terminate Arriaga's employment.

submitted her application at HIMA the Respondents did not consider her conduct at HSR sufficiently serious as to justify her dismissal. Rather, Arriaga was simply placed on a 15-day suspension in June and thereafter returned to work and remained employed, apparently without any further incident, until HSR officially closed in November.[13]

Accordingly, we find that the Respondents' exceptions regarding Suarez, Merced, Arriaga, and Flores lack merit and that the Respondents did not meet their *Wright Line* burden.

On the other hand, we find that the Charging Party's exception concerning Diaz has merit. The General Counsel alleged that since April 4, 1989, the Respondents have refused to employ Delia Diaz as a medical records technician at HIMA. The judge found that two other individuals were instead hired for that type of position at HIMA in April and June 1989. He found that Diaz was not hired by the Respondents because Veintidos "logically assumed that Diaz was not working for [HSR], and was not on a list of people either coming to HIMA or being laid off at HSR." On the basis of this assumption, the judge found no violation of the Act. We reverse.

Contrary to the judge's findings, Veintidos uncontrovertedly testified that she did not employ Diaz at HIMA because she assumed that Diaz had a job at HSR. However, in light of the

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[13] Cf. *New York Telephone*, 300 NLRB 894 (1990), *enfd. mem.* 940 F.2d 648 (2d Cir. 1991). In that case, the Board found that the employer had not unlawfully refused to rehire an employee who had voluntarily resigned 2 years earlier. The employer considered the employee ineligible for rehire because of his poor attitude displayed, inter alia, on the job and by certain statements made in his resignation letter. In finding no intent to discriminate against the employee on the part of the employer, the Board took into account that the employee's prior voluntary resignation had provided the employer with an opportunity to reevaluate him notwithstanding the fact that his poor work attitude had been previously tolerated by the employer prior to his resignation and that the employer relied, in part, on the statements in his resignation letter.

circumstances, reflected in uncontroverted testimony, more fully described below, even this assumption held by Veintidos does not justify the Respondents' actions towards Diaz.

Diaz was an active union supporter who had worked as a medical records technician at HSR for 6 years. In a late-summer 1988 interview with Veintidos, Diaz showed interest in working for the Respondents at HIMA and accepted a job application which she later completed and returned. This application, dated October 13, 1988, indicates that Diaz preferred a medical-records-technician position at HIMA.

Diaz was never contacted about her pending application at HIMA. In late October 1988, she telephoned Veintidos to assertain the status of her application. Veintidos never returned these telephone calls from Diaz, who continued to work in the medical records department at HSR.

After Diaz received a termination letter from HSR on November 7, 1988, Diaz spoke with Elsa Maldonado, her supervisor at HSR,[14] who told her to disregard the letter because it was a mistake. At the end of November 1988, Diaz again approached Maldonado to see if she knew when her transfer to HIMA would occur. Diaz indicated that if she was not offered a job at HIMA soon that she could no longer remain at HSR where the work was winding down. Maldonado told Diaz that she knew nothing about Diaz' situation. Then by letter dated November 30, 1988, Maldonado asked Diaz to verify within the next 5 working days that she wanted to continue working at HSR.

On December 9, 1990, Diaz contacted Maldonado about the November 30 letter. Diaz went to the HSR facility and discovered that the medical records department had been closed and that Maldonado was already working at HIMA. She telephoned

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[14] Maldonado did not testify at the hearing.

Maldonado there. In that conversation, Diaz told Maldonado that she was not refusing to work at HSR but that she wanted some job security at HIMA because there was no more work left at HSR.[15]

We find that the General Counsel has presented a prima facie showing that Diaz' union activities were a motivating factor in the Respondents' decision not to hire her at HIMA and that the Respondents have failed to meet their *Wright Line* burden. The Respondents were aware that Diaz was an active union supporter, and they harbored a strong animus towards union activities. Veintidos knew that Diaz was seeking work at HIMA. Diaz wanted a medical-records-technician position for which she was apparently well qualified in light of her long tenure at HSR. Contrary to the judge's findings, Veintidos testified that she did not employ Diaz at HIMA based on an assumption that Diaz had a job at HSR. Veintidos, however, offered no explanation as to (1) why employment at HSR made Diaz, and not others, ineligible for work at HIMA and (2) how Diaz could be still working at HSR in April 1989 many months after the closing of HSR and its medical records department. Under these circumstances, we find that a violation of Section 8(a)(3) and (1) was established under the *Wright Line* test. Accordingly, we conclude that the Respondents unlawfully denied employment to Diaz as alleged by the General Counsel.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 7, 10, 12, and 13 of the judge's decision.

"7. By failing and refusing to bargain collectively and in good faith with the Union from about July 29, 1987, to November 14,

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[15] The judge inferred that Maldonado had been confused by her conversations with Diaz. We find any such confusion irrelevant because Veintidos did not testify that she considered any of these matters in rejecting Diaz for employment at HIMA.

1988, and by violating the terms of a settlement agreement entered into on May 19, 1988, Hospital San Rafael, Inc. and Centro Medico del Turabo, Inc., as a single employer and alter egos of each other, violated Section 8(a)(5) and (1) of the Act.

"10. By unilaterally and without notification to or consultation with the Union changing wages, hours, and conditions of employment of employees in the units described below, Centro Medico del Turabo, Inc., as the alter ego of Hospital San Rafael, Inc., violated Section 8(a)(1), (3), and (5) of the Act.

"12. By refusing to rehire or to continue to employ Milton Suarez, Carmen Merced, Isabel Arriaga, Norma Flores, and Delia Diaz, Centro Medico del Turabo, Inc. violated Section 8(a)(3) and (1) of the Act.

"13. By failing and refusing to bargain in good faith with the Union as the representative of its employees in both units A and B, described above, on and after August 8, 1989, and until October 20, 1989, Centro Medico del Turabo, Inc. violated Section 8(a)(5) and (1) of the Act."

Delete Conclusions of Law 4 and 9 of the judge's decision and renumber the subsequent paragraphs.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, in view of our findings of single employer and alter ego status, we shall order the Respondents to bargain in good faith with the Union concerning the wages, hours, and other terms and conditions of employment for unit employees in units A and B and embody the terms of any such agreement reached with the Union in a signed written document. The Respondents shall also

maintain in full force and effect the 1984-1987 collective-bargaining agreement with the Union. However, we shall not require the Respondents to rescind any changes in terms and conditions of employment, although previously made unilaterally, that are beneficial to unit employees, except on request by the Union. We also shall order the Respondents to make unit employees whole for any losses incurred because of the Respondents' unlawful unilateral changes or because of the Respondents' failure to abide by the 1984-1987 agreement as prescibed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We also shall order the Respondents to offer to Milton Suarez, Carmen Merced, Isabel Arriaga, Norma Flores, and Delia Diaz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed. The Respondents are further required to make each of these individuals whole for any loss of earnings incurred by reason of the Respondents' discrimination against them, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, supra. We shall also require the Respondents to expunge from their files any reference to their failure to rehire or employ Suarez, Merced, Arriaga, Flores, and Diaz, and to notify them in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against them. See *Sterling Sugars*, 261 NLRB 472 (1982).

Because of the serious nature of the violations and the Respondents' egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, we find it appropriate to issue a broad order, requiring the Respondents to cease and desist from infringing in any other manner on rights

guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

ORDER

The National Labor Relations Board orders that the Respondents, San Rafael Hospital, Inc. and Centro Medico del Turabo, Inc. and its subsidiaries, Turabo Medical Center Limited Partnership and Hospital Interamericano de Medicina Avanzada, Caguas, Puerto Rico, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition of Union Nacional de Trabajadores de la Salud, 1199, affiliated with National Union of Hospital and Health Care Employees, AFL-CIO, as the exclusive representative of their employees in units A and B described below.

(b) Failing and refusing to recognize and bargain collectively with the Union as the exclusive representative of their employees in units A and B.

(c) Failing and refusing to abide by the 1984-1987 collective-bargaining agreement applicable to the employees in units A and B.

(d) Unilaterally changing the wages, hours, and working conditions of their unit employees without prior notice to the Union and without first affording the Union an opportunity to meet and bargain concerning such matters.

(e) Failing and refusing to employ or recall for employment or otherwise discriminating against employees who support the Union.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union concerning the wages, hours, and other terms and conditions of employment for the employees in the following appropriate units and, if an agreement is reached, embody the terms of the agreement in a signed written document:

Unit A

Included: All registered nurses and pharmacists employed by the Respondents at their hospital located in Caguas, Puerto Rico.

Excluded: All other employees, office clerical employees, guards and supervisors as defined in the Act.

Unit B

Included: All licensed practical nurses and technicians employed by the Respondents at their hospital located at Caguas, Puerto Rico, including escorts; EKG technicians; Respiratory Therapy technicians; X-Ray technicians; Operating Room Technicians; Dietary Technicians; Medical Records Technicians; Admission Clerks; Record Room Clerks; X-Ray Clerks; Diet Department Clerks; Respiratory Therapy Clerks; Pharmacy Clerks; Operating Room Clerks; Emergency Room Clerks; Ward Clerks; and Pharmacy Auxiliaries.

Excluded: All other employees, office clerical employees, professional personnel, guards and supervisors as defined in the Act.

(b) Maintain in full force and effect the 1984-1987 collective-bargaining agreement applicable to both units A and B; however, adhere to any changes in wages, benefits, or other terms and conditions of employment for unit employees which were

unilaterally instituted, but are superior to those set forth in the agreements, except on request by the Union.

(c) Make unit employees whole for any losses that they may have suffered because of any unilateral changes in wages, hours, and working conditions or because of the Respondents' failure to abide by the 1984-1987 collective-bargaining agreement with the Union, in the manner set forth in the remedy section of this decision.

(d) Offer to Milton Suarez, Carmen Merced, Isabel Arriaga, Norma Flores, and Delia Diaz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and make each of them whole for any loss of earnings that they may have suffered by reason of the discrimination against them, in the manner set forth in the remedy section of this decision.

(e) Remove from its files any references to the unlawful refusals to rehire or employ Milton Suarez, Carmen Merced, Isabel Arriaga, Norma Flores, and Delia Diaz and notify each of them in writing that this has been done and that the refusals to rehire or employ will not be used against them in any way.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at their facility in Caguas, Puerto Rico, copies of the attached notice marked "Appendix."[16] Copies of the notice, in

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[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States

both English and Spanish, on forms provided by the Regional Director for Region 24, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents has taken to comply.

MEMBER OVIATT, concurring in part and dissenting in part.

In finding that the settlement agreements of May 19, 1988, should be set aside, the judge reasoned that HSR's settlement with the Union *necessarily* included a committment to bargain on behalf of CMT as to who would be the named Employer, as well as coverage, etc., and that by declining to include CMT, HSR showed it never had any intention of bargaining in good faith. I disagree.

In my view, the judge's conclusion that the settlement agreements "necessarily included" the committments he projected is simply incorrect. In view of the Union's entirely separate agreements with HSR and CMT, the differing provisions of those agreements, and that CMT was not even to open until several months later, it seems to me that the settlements cannot logically be construed as the judge hypothesized.

Accordingly, I would not set aside the May 1988 settlement agreements.

Court of Appeals Enforcing an Order of the National Labor Relations Board."

I agree, however, with the judge's alternate successorship findings, and I concur with my colleagues in the other violations found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT withdraw recognition of Union Nacional de Trabajadores de la Salud, 1199, affiliated with National Union of Hospital and Health Care Employees, AFL-CIO, as the exclusive representative of our employees in units A and B described below.

WE WILL NOT fail and refuse to recognize and bargain collectively with the Union as the exclusive representative of our employees in units A and B.

WE WILL NOT fail and refuse to abide by the 1984-1987 collective-bargaining agreement applicable to our employees in units A and B.

WE WILL NOT unilaterally change the wages, hours, and working conditions of our unit employees without prior notice to the Union and without first affording the Union an opportunity to meet and bargain concerning such matters.

WE WILL NOT fail and refuse to employ or recall for employment or otherwise discriminate against employees who support the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union concerning the wages, hours, and other terms and conditions of employment for the employees in the following appropriate units and, if an agreement is reached, embody the terms of such agreement in a signed written document:

Unit A

Included: All registered nurses and pharmacists employed by the Respondents at their hospital located in Caguas, Puerto Rico.

Excluded: All other employees, office clerical employees, guards and supervisors as defined in the Act.

Unit B

Included: All licensed practical nurses and technicians employed by the Respondents at their hospital located at Caguas, Puerto Rico, including escorts; EKG technicians; Respiratory Therapy technicians; X-Ray technicians; Operating Room Technicians; Dietary Technicians; Medical Records Technicians; Admission Clerks; Record Room Clerks; X-Ray Clerks; Diet Department Clerks; Respiratory Therapy Clerks; Pharmacy Clerks; Operating Room Clerks; Emergency Room Clerks; Ward Clerks; and Pharmacy Auxiliaries.

Excluded: All other employees, office clerical employees, professional personnel, guards and supervisors as defined in the Act.

WE WILL maintain in full force and effect the 1984-1987 collective-bargaining agreement applicable to both units A and B; however, WE WILL adhere to any changes in wages, benefits, or other terms and conditions of employment for unit employees which were unilaterally instituted, but are superior to those set forth in the agreement, except on request by the Union.

WE WILL make unit employees whole for any losses that they may have suffered because of any unilateral changes in wages, hours, and working conditions or because of our failure to abide by the 1984-1987 collective-bargaining agreement with the Union.

WE WILL offer to Milton Suarez, Carmen Merced, Isabel Arriaga, Norma Flores, and Delia Diaz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other right or privilege previously enjoyed, and

WE WILL make each of them whole for any loss of earnings that they may have suffered by reason of our discrimination against them, with interest.

WE WILL remove from our files any references to our unlawful refusals to rehire or employ Milton Suarez, Carmen Merced, Isabel Arriaga, Norma Flores, and Delia Diaz and notify each of them in writing that this has been done and that the refusals to rehire or employ will not be used against them in any way.

HOSPITAL SAN RAFAEL, INC. CENTRO MEDICO DEL TURABO, INC. AND ITS SUBSIDIARIES, TURABO MEDICAL CENTER LIMITED PARTNERSHIP AND HOSPITAL INTERAMERICANO DE MEDICINA AVANZADA

Raymond E. Morales, Esq., Efraim Rivera Vega, Esq., and Mori Pam Rubin, Esq., for the General Counsel.

Godwin Aldarondo Girard, Esq., of Hato Rey, Puerto Rico, for Respondent Hospital San Rafael, Inc.

Heber E. Lugo Rigau, Esq. (Ledesma, Palou and Miranda),[1] of Hato Rey, Puerto Rico, for Respondents Centro Medico del Turabo, Joaquin Rodriquez, Turabo Medical Center and Hospital Interamericano de Medicina Avanzada.

Sr. Luis Alvarez Colon, of Caguas, Puerto Rico, and *Jorge Farinacci, Esq.*, of Hato Rey, Puerto Rico, for the Charging Party.

DECISION

GEORGE F. MCINERNY, Administrative Law Judge. This matter began with the filing of a charge by Union Nacional de Trabajadores de la Salud, 1199 (the Union), on September 21, 1987, alleging that Hospital San Rafael, Inc. (HSR), or together with other employers named later, as Respondent, had violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act (the Act). This charge, Case 24-CA-5646, was amended on October 7, 1987, and further amended on November 30, 1987, to include as Respondents San Rafael Planning, Inc. (SRP) and Centro Medico del Turabo, Inc. (CMT).

Additional charges were filed by the Union against HSR on October 28, 1987, in Case 24-CA-5675, amended on November 30, 1987, to include SRP and CMT as Party Respondents. Also on November 30 the Regional Director for the Region 24 of the National Labor Relations Board (the Regional Director, and the Board), issued a complaint and order consolidating cases in Cases 24-CA-5646 and 24-CA-5675 alleging that HSR, SRP and CMT are alter egos of each other, and a single employer, within the meaning of the Act; that these Employers, the Respondent had refused to bargain in good faith with the Union as the certified collective-bargaining representative of certain of its employees in

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[1] Lugo was associated with the firm *Lespier and Munoz Noya*, of San Juan, Puerto Rico, until October 13, 1989, when he joined the firm of Ledesma, Palou & Miranda. Associated with Lugo up to October 13, 1989, in this matter was *Raquel M. Dulzaides, Esq.*, of *Lespier and Munoz Noya*.

two appropriate bargaining units; that the Respondent had failed to allow access to its premises to union representatives; and had refused to apply the terms of a collective-bargaining agreement to a number of employees who were entitled to be covered by that agreement.

Another charge was filed by the Union on November 30, 1987, in Case 24-CA-5697 alleging further instances of unlawful refusal to bargain, and on January 12, 1988, the Union filed a charge in Case 24-CA-5722, containing still more allegations of unlawful unilateral actions. This last charge was amended on February 12, 1988.

On February 26, 1988, the Regional Director issued a new order consolidating Cases 24-CA-5646, 24-CA-5675, 24-CA-5697 and 24-CA-5722 and a consolidated complaint alleging the alter ego status of Respondent and a number of instances of refusal to bargain, unilateral actions, and harassment of union agents, as unfair labor practices.

A new charge containing the same type of allegations was filed by the Union on March 28, 1988, against the same Respondents, and amended on April 20, 1988. On April 21, the Regional Director issued a separate complaint in Case 24-CA-5765, alleging the alter ego status of the Respondents; failure to continue in force the terms of a collective-bargaining agreement, refusing to discuss grievances, and the imposition of new and different benefits without consulting the Union. Also on April 21, the Regional Director ordered this case consolidated with the other four for hearing.

The complaints in Case 24-CA-5765 and in Cases 24-CA-5646, 24-CA-5675, 24-CA-5697, and 24-CA-5722 were amended by separate documents on April 29, 1988, primarily to include the name of another Respondent, Turabo Medical Center Limited

Partnership (TMCLP) as a Party Respondent and alter ego, along with HSR, SRP, and CMT.[2]

It was in this procedural status that the matter came before me for hearing on May 17, 1988, at Hato Rey, Puerto Rico. After some preliminary activity on the record, including the filing of formal papers, an opening statement by the General Counsel, and the allowance of a motion by the General Counsel to further amend the complaints, the parties began to discuss an informal settlement of the issues. These discussions continued until the afternoon of May 19 when the parties finally agreed on settlement of the issues in the case through two non-Board agreements, one between the Union and HSR, and the second between the Union, CMT and TMCLP. The written settlement documents were received into evidence, whereupon the Union withdrew all of the charges it had filed in these cases, and the General Counsel withdraw the complaints herein. I accepted the withdrawal of the charges, and granted the motion to withdrew the complaint.[3] The hearing was then closed.

The situation was not settled, however, and on October 18, 1988, the Union filed with me an "Urgent Petition Requesting Order Vacating Non Board Settlement Agreement." This document alleged that HSR had violated several sections of the May 19 settlement agreement and requested that the charges against HSR be reinstated.

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[2] All of these complaints and amendments were duly answered by counsel for HSR and SRP, and counsel for CMT and TMC, who denied the commission of any unfair labor practices, and denied further that these two groups of employers were alter egos of each other, or a single employer for purposes of the Act.

[3] As requested by the General Counsel these actions were conditioned upon compliance by the parties with the terms and conditions of the settlement agreements.

In addition, further charges were filed by the Union against HSR and CMT on December 2, 1988, in Case 24-CA-5886, amended on December 13 to include TMC as a Party Respondent and further amended on February 17, 1989, and alleging refusals to bargain, and on December 13 in Case 24-CA-5889, alleging that TMC doing business as Hospital Interamericano de Medicina Avanzada (HIMA) had refused to hire certain individuals because of their union activities. This charge was amended on February 17, 1989.

Based upon the charges in Cases 24-CA-5886 and 24-CA-5889, the Regional Director issued a consolidated complaint on February 28, 1989, alleging that HSR, CMT and Joaquin Rodriguez, d/b/a TMC d/b/a HIMA had violated Section 8(a)(1)(3) and (5) of the Act.[4] The issuance of this new complaint was followed on March 6, 1989, by a motion by the General Counsel in Cases 24-CA-5646, 24-CA-5675, 24-CA-5697, 24-CA-5722 and 24-CA-5765. After recapitulating the history of the settlement negotiations and agreement; the Union's urgent request of October 18, 1988; the charges and amendments in Cases 24-CA-5886 and 24-CA-5889; and the consolidated complaint in these latter two cases, the General Counsel alleged that some of the provisions of the May 19, 1988 settlement agreement between the Union and HSR were also violated. The General Counsel stated that "the unremedied portions of the charges and of the previously issued amended consolidated complaint (of February 26, 1988) should be reinstated and the unremedied portions of the non-Board settlement should be set aside.[5]

Specifically, the General Counsel argued that those portions of the charges in Cases 24-CA-5646 and 24-CA-5722, dealing with

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[4] This complaint was amended, for technical reasons, on April 5, 1989, and to include additional explanatory material, on April 19, 1989.

[5] Citing *Norris Concrete Materials, Inc.*, 282 NLRB 289 (1986).

the alleged conditioning of bargaining by HSR on the deletion from the Union's proposals of references to CMT, and the withdrawal of recognition of the Union by HSR, should be reinstated. The remaining allegations in Cases 24-CA-5646 and 24-CA-5727, as well as all of the allegations in Cases 24-CA-5675, 24-CA-5697, and 24-CA-5765 were specifically not included in the General Counsel's motion.

The General Counsel also moved to reinstate the amended consolidated complaint in Cases 24-CA-5646, 24-CA-5675, 24-CA-5697, and 24-CA-5722, stating that he would move to amend this reinstated complaint to delete any alleged violations which were remedied by the settlement agreements.[6]

Finally, the General Counsel moved to consolidate the reinstated complaint with the new complaint, issued on February 26, 1989, in Cases 24-CA-5886 and 24-CA-5889 in order to try all of the cases, still living, at a single hearing.

All of these matters having been referred to me, and in light of a trial date set for May 30, 1989, and without taking any testimony and documentary evidence on the merits of the numerous allegations presented here, I did not feel that I was able to distinguish between those areas of the complaints and charges (involved in the settlement agreement) which were to be reinstated and which were not. Accordingly, on May 4, I issued an order explaining in more detail what I have just said here, and ordering that the May 19, 1988 settlement agreements be set aside, that the amended consolidated complaint in Cases 24-CA-5646, 24-CA-5675, 24-CA-5697, 24-CA-5722, and 24-CA-5765 be reinstated and consolidated with the complaint in Cases

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[6] The General Counsel stated that since the allegations in the complaint in Case 24-X-5765 [sic] were substantially remedied by the settlements, he would not move to reinstate that complaint.

24-CA-5886 and 24-CA-5889 for trial, beginning on May 30, 1989.

During the course of the hearing new charges were filed in Cases 24-CA-5949 on May 3, 1989, and 24-CA-6030 on October 6, 1989. A motion to further amend the amended aonsolidated complaint and to consolidate Case 24-CA-5949 with the prior cases herein, was presented by the General Counsel on July 10, 1989. This motion was allowed, adding Norma Flores and Delia Diaz to the names of alleged discriminatees, and the new Case 24-CA-5949, to the caption.

Two collateral proceedings came on to decision during the summer of 1989, both of which had some effect on the course of this hearing, and on the actions of the parties involved here. First, on June 16, Hospital San Rafael, which by this time had closed its doors to patients and was winding down its affairs, filed a Petition under Chapter 11 of the Bankruptcy code (in Bankruptcy, No. 89-02549, Ch. 11, United States Bankruptcy Court, District of Puerto Rico). On July 14, HSR, by its attorneys, filed a motion with the Bankruptcy Court for an order enjoining this Board from continuing to process the instant matter. On July 20 the Bankruptcy Court, (Enrique S. Lamoutte, J.) denied this motion. Thereafter, nothing further was heard of the bankruptcy matter in this proceeding.

The second matter impinging on the instant case was an order in a petition for an injunction filed by the Regional Director for Region 24 in the United States District Court for the District of Puerto Rico, Civil 89-0490CC, under Section 10(j) of the Act (29 U.S.C. § 160j) against CMT and Joaquin Rodriguez, d/b/a TMCLP d/b/a HIMA. The subject matter of this 10(j) action reflected some of the issues which were before me at that time.

After discussing the issues in a comprehensive and scholarly opinion issued on August 8, 1989, the Court (Carmen Consuelo Cerezo, J.) ordered the Respondents to refrain from recognizing

and bargaining with the Union (Union Nacional de Trabajodores de la Salud, 1199, a/w National Union of Hospital and Health Care Employees, AFL-CIO) as the representative of its licensed practical nurses and technicians, and from refusing to offer employment to individuals because of their activities on behalf of the Union. The Court further ordered the Respondents to bargain in good faith with the Union, and to reinstate Milton Suarez to his former position.

On October 4, the General Counsel filed a motion to amend the existing amended consolidated complaint restating, as the General Counsel explained, those allegations in the prior amended consolidated complaint where he believed the Respondents were not in compliance with the May 19, 1988 settlement agreements, and to inform the parties which allegations the General Counsel is in fact litigating. This motion was allowed on October 16, 1989.

Finally, on October 6, 1989, the Union filed a new charge in Case 24-CA-6030, alleging that Respondents CMT and Joaquin Rodriguez d/b/a TMCLP d/b/a HIMA had violated Section 8(a)(1), (3) and (5) of the Act. This charge was amended on October 26, and again on December 12, 1989. As the result of these charges, a complaint issued on December 15, 1989 alleging a continued refusal to bargain in good faith from August 11, to October 10, 1989, had issued a written warning to Milton Suarez, and had threatened its employees because of their union activities. The General Counsel moved on December 19, 1989, to consolidated this case, Case 24-CA-6030 with the other cases heretofore mentioned, and to add as a Party Respondent, Caribe Hospital Affiliates, Inc., (CHA) which has contracted with Respondent CMT to operate the new hospital, HIMA.

The case came on to be heard on May 30, 1989, and continued at various dates until May 21, 1990.[7] At the hearing all parties were represented by counsel, and all had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argues orally. After the hearing the Respondents and the General Coursel submitted briefs which have been carefully considered.

Based upon the entire record, including my observations of the witnesses, and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

A. Hospital San Rafael closed on November 14, 1988. Before that date, and during periods covered by the allegations, HSR maintained and operated a general hospital in the City of Caguas, Puerto Rico. In the normal course of its business, HSR annually derived gross revenues in excess of $ 250,000 and purchases and received goods and services valued in excess of $ 50,000 directly from points located outside the Commonwealth of Puerto Rico. These facts were admitted in answers filed by HSR to the original complaint in Cases 24-CA-5646 and 24-CA-5675 which issued on November 30, 1987, and to subsequent amendments and consolidations to this complaint, up to February 1989, when, after HSR had closed, it denied, in its answer to a complaint dated February 28, 1989, that it was an employer engaged in commerce. There was no denial, however, that during the times when it was

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[7] Including hearing dates made necessary by the filing of new charges and a lost portion of the transcript.

alleged that HSR committed unfair labor practices HSR was subject to the Board's jurisdiction.[8]

I find that HSR is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

B. San Rafael Planning (SRP) was named as a Party Respondent in the original complaint in Cases 24-CA-5646 and 24-CA-5675, but its name was dropped from the caption by the time the Complaint issued in Cases 24-CA-5886 and 24-CA-5889 in February 1989. Both HSR and CMT have denied that SRP was an employer in commerce within the meaning of the Act.

I note that the original complaint in Cases 24-CA-5646 and 24-CA-5675, issued on November 30, 1987, does not allege that SRP is an employer engaged in commerce, but only that it is a corporation duly organized under, and existing by virtue of, the laws of the Commonwealth of Puerto Rico; that it had its office and place of business in the city of Caguas, and that it was engaged in the operation of Hospital San Rafael.

The undisputed evidence shows that these allegations were and are accurate. SRP is a Puerto Rico corporation and was during all times material here the owner of approximately 87 percent of the stock of HSR. SRP had no employees, and conducted no other business or trade during times material here. The evidence, rather, indicates that at least after the formation of Centro Medico del Turabo in 1978 or 1979, SRP took no part in the management of SRH, or in the activities which led to the development and construction of HIMA.

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[8] Several of the answers filed on behalf of Centro Medico del Turabo (CMT) and CMT with Juaquin Rodriguez, as partners in Turabo Medical Center, a Limited Partnership (TMCLP) d/b/a Hospital Interamericano de Medicina Avanzada (HIMA) denied that HSR was engaged in commerce within the meaning of the Act. I find that these responses are disingenuous as well as frivolous, and they are striken from those answers.

I find that SRP is the parent company of HSR, and, in fact, was doing business as HSR during all times relevant to the issues in this case.

C. Centro Medico del Turabo, like San Rafael Planning, is basically a holding company rather than itself an employer. Indeed, the uncontradicted evidence shows that CMT was organized by the shareholders of SRP to plan and eventually to build a hospital to replace HSR. Like SRP, CMT had no employees, but unlike SRP, it had a full complement of officers and directors. CMT also was and is the general partner in Turabo Medical Center, a Limited Partnership organized in 1980 under the laws of the State of Delaware. While both HSR and CMT in their answers to early formal documents in this matter denied that CMT was an employer engaged in commerce within the meaning of the Act, the most recent answer by CMT, to the consolidated complaint issued on February 28, 1989, in Cases 24-CA-5886 and 24-CA-5889, admitted that CMT was an employer so engaged, under Section 2(2), (6) and (7) of the Act.

I find that CMT is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

D. Turabo Medical Center Limited Partnership was established by CMT in 1980 to act as the operating arm of CMT in the planning, financing and construction of a new hospital, and to operate that hospital when it was built and open for business. CMT was and is the general partner, and, for a number of reasons, including revisions of United States tax laws, the plan for sale of limited partnerships did not go through, leaving only one limited partner, Joaquin Rodriguez, up to the time of this hearing. In its answer to the February 28, 1989 complaint, mentioned above, CMT did not deny that TMCLP was as described here, a Delaware Limited Partnership, and that it does operate a hospital, Hospital Interamericano de Medicina Avanzada (Interamerican Hospital for Advance Medicine or HIMA), has a usual place of

business in Caguas, Puerto Rico, and HIMA is anticipated to derive gross revenues in excess of $ 250,000, and to receive goods valued at over $50,000 directly from points outside the Commonwealth of Puerto Rico.

I find that CMT was and is doing business as TMCLP, which in turn is doing business as HIMA, the combined entity constituting an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.[9]

E. Caribe Hospital Affiliates, Inc. (CHA) according to the credible and undenied testimony of Carlos M. Pineiro Crespo, who was administrator of HIMA from October 1988 to September 30, 1989, was hired under a contract with TMCLP to manage the day-to-day operations of HIMA.

CHA is a Puerto Rican corporation which has its headquarters at Bayamon, Puerto Rico, and operates at various hospitals and other locations in Puerto Rico and in the Virgin Islands. The Company was notified of this hearing but failed to appear or answer allegations that it is an employer engaged in commerce, an agent of, and a joint employer with TMCLP. While the complaint in Case 24-CA-6030 alleged that CHA is an employer engaged in commerce, there are no allegations in the complaint specifying amounts of business or interstate transport of goods, supplies and materials purchased by CHA. The management agreement between CHA and TMCLP provides for a management fee of at least $8000 and up to $35,000 per month together with unspecified costs of salaries and fringe benefits for an executive director, an assistant, and a chief financial officer, together with all necessary expenses. In view of the size of this hospital, I think it can be fairly inferred that CHA, which also has a number of similar

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[9] As in the case of HSR, I find that the answers to several of the complaints here, denying that CMT, or TMCLP were or are engaged in commerce, are disingenuous as well as frivolous and those denials are stricken.

agreements both in Puerto Rico and the Virgin Islands, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I further note that CHA was not involved in any of the alleged unfair labor practices here, but the contract between it and TMCLP shows that it is the agent of, and a joint employer with CMT and its subsidiaries.

II. THE LABOR ORGANIZATION INVOLVED

The various cmplaints allege, the answers admit, and I find that Union Nacional de Trabajadores de la Salud, 1199, a/w National Union of Hospital and Health Care Employees, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Settlement Agreements*

As I have described above in the narration of procedures in this matter, the parties reached settlements of the issues set out in the cmplaints in Cases 24-CA-5646, 24-CA-5675, 24-CA-5697, 24-CA-5722, CA-24-5765 on May 19, 1988. There were two settlements, the first of which, between HSR and the Union, provided that "It is understood by the parties that this agreement is entered into by HSR in order to avoid protracted, lengthy and costly litigation and does not constitute nor may it be so construed, an admission by HSR of having violated any applicable laws."

The agreement stated that HSR recognized the Union as the exclusive representative of its employees in the units certified by the Board; that HSR and the Union agreed to continue negotiating in good faith; that HSR would continue to honor the terms of the parties' collective-bargaining agreement; that HSR would pay $2620 to the Union for uncollected dues no later than May 23, 1988; that certain named employees were included within the bargaining units, and that certain other named employees were not; that the parties would continue to process grievances, and that the parties would negotiate the terms and conditions of the part-

time employees in the bargaining units; that HSR would compensate with retroactive pay and benefits the employees newly included in the bargaining units; and in consideration of all of this, the Union agreed, conditionally, to withdraw the charges in Cases 24-CA-5646, 24-CA-5675, 24-CA-5697, 24-CA-5722, and 24-CA-5765.

This agreement was signed by Luis Alvarez Colon for the Union, and by Carlos M. Pineiro, executive vice president, and Eladio Cartagena, corporate counsel, for the Company.

The concurrent agreement between CMT, TMCLP and the Union contained the same statement that the agreement was entered into by CMT and TMCLP "in order to avoid protracted, lengthy and costly litigation" and did not constitute an admission by either Respondent that it had violated any law, nor a recognition of any labor organization as representative of employees of CMT or TMCLP.

Specifically, the agreement stated that CMT and TMCLP made a commitment to employ, at HIMA, a minimum of 95 percent of the employees employed by HSR at the time that HIMA was to begin its operations as a hospital; that all employees who are employed by HSR at the time HIMA begins its operations, and who are employed by HIMA will be deemed to have been hired on the first day of operation of HIMA; that all other employees hired by HIMA will be deemed to have been employed as of the second day of operations at HIMA, or later, depending on date of hire; and that CMT and TMC agree to hire and employ on a non-discriminatory basis, and not to condition employment on membership or non-membership in a labor organization.

In consideration of these undertakings, the Union agreed, conditionally, to withdraw the charges in Cases 24-CA-5696, 24-CA-5675, 24-CA-5697, 24-CA-5722, and 24-CA-5765.

This agreement was signed by Alvarez for the Union, and by Joaquin Rodriguez, as president on behalf of CMT and TMCLP.

As a result of these agreements, the General Counsel moved, on May 19, 1988, to withdraw the complaints theretofore issued with the understanding that "upon non-compliance with the terms of these agreements the parties will -- file a motion -- for reinstatement of the charges" and the complaints. I granted the motions to withdraw the charges and the complaints and the matter was closed.

After this the Union and HSR did sit down to negotiate, but the efforts of the parties to find a common ground foundered on the question of the inclusion of CMT - TMCLP as a Party Employer.[10] On September 14, 1988, HSR, acting through its attorney and chief negotiator, Godwin Aldarondo Girard, withdrew from the negotiations because of the Union's insistence on the inclusion of CMT in the preamble (or "appearance") clause. Aldarondo stated that there would be no discussion of any other articles until this preamble was straightened out; that there would be no inclusion of CMT, which was not a party to these negotiations, and that he was going to take the matter to the Board. There were no further discussions between HSR and the Union after September 14. Meanwhile, the time was drawing nigh for Hospital San Rafael to close and for the new Hospital Interamericano de Medicine Avanzada to open. These facts prompted the Union to have its Attorney (at this time Raul Santiago Melendez of the firm of Bufete, Feriz Munoz and Santiago Melendez) to file an "Urgent Petition Requesting Order Vacating non Board Settlement "on October 18, 1988, requesting

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[10] These negotiations will be discussed at length below.

that the charges and complaints against HSR be reinstated, and that the hearing be reopened.[11]

While this motion was under study by the Board's Regional Office, two charges were filed by the Union on December 2 and 13, 1988, alleging new violations'[12] of Section 8(a)(5) of the Act by HSR and CMT, and violations of Section 8(a)(1) and (3) by CMT. These charges were the subject matter of a new consolidated complaint dated February 28, 1989, alleging violations of Section 8(a)(5) by HSR and CMT and of 8(a)(3) by CMT.

On March 6, 1989, the General Counsel filed with me a motion asking that portions of the charges in Cases 24-CA-5646 and 24-CA-5722 which were not remedied by the settlement agreements, be reinstated, and that the unremedied portions of the complaints in Cases 24-CA-5646, 24-CA-5675, 24-CA-5697, and 24-CA-5722 be reinstated. The General Counsel also moved to consolidate the reinstated consolidated complaint with the new consolidated complaint in Cases 24-CA-5886 and 24-CA-5889 in order to combine the whole matter for trial at a single hearing.

In ruling on these motions, I considered the difference between the positions of the Union and the General Counsel; the fact that at the time I was called upon to make the ruling I had not seen the

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[11] CMT was mentioned in the caption to this motion, but there was no prayer in the motion to set aside the settlement agreement between the Union and CMT, or to reopen the hearing as to CMT. The record shows that as of October 18, HIMA had still not hired any employees, or opened its doors for business.

[12] These allegations were "new" in the sense that the actions complained of occurred after the date of the settlement agreements.

positions of Respondents on the issues;[13] the fact that determinations of which parts of the old complaints should be reinstated and which should not would necessarily depend upon evidence to be adduced at the reopened hearing; and simple fairness to all parties. Having done all that, I ordered that the settlement agreements be set aside,[14] the prior complaints be reinstated, and that these complaints be consolidated with the new consolidated complaint in Cases 24-CA-5886 and 24-CA-5889 for purposes of hearing.

During the hearing, questions were raised by the General Counsel concerning my ruling insofar as it reinstated the original complaints in their entirety; and by Respondents is that my ruling set aside the settlement agreements themselves. Respondents argued, in effect, that by entering into the agreements, the Union had waived any arguments it may have advanced that HSR and CMT were a single employer, or alter egos and that the single employee issue was settled for all time by the settlement agreements. The General Counsel felt that I had gone too far in reinstating the original complaints, because most of the allegations in those complaints which were included in the settlement agreements had been remedied by the Respondents. What was left, after comparing what the Respondents did to live up to the settlements, was an alleged violation of the HSR agreement in that HSR continued to refuse to bargain in good faith by failing and refusing to bargain with the Union for a contract covering

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[13] Indeed, counsel for CMT had not received a copy of the Union's Motion at all, and had submitted no position before the hearing reopened on May 30, 1989.

[14] Subject to reconsideration after the receipt of all material evidence submitted by the parties.

employees of CMT as well as those of HSR.[15] This alleged violation, of course, is dependent upon whether, as a matter of law, HSR and CMT are a single employer, or whether CMT is merely an alter ego, or a disguised continuance of HSR. The alleged violations of the CMT agreement concerned a provision therein that CMT would not discriminate in hiring on account of union membership, or concerted activity by prospective employees. Of course, CMT had no employees in May 1988, when the settlement agreement was executed. Its obligation to refrain from discrimination in hiring was prospective only, and its obligations under the Act as an employer were, at that time, dependent upon the existence of its single employer, alter ego, relationship with HSR.

Since the issue of whether the Respondents had violated the terms of their settlement agreements turned upon the question of the relationship between them, I did not think it was appropriate for me to rule on the settlement issue until all parties had had the opportunity to present evidence bearing on the single employer - alter egos issue. My decision finding that HSR, CMT and TMCLP are a single employer and alter ego is set out below. Thus, it is appropriate now for me to decide the questions of violations of the settlement agreements.

In this case HSR and CMT had knowledge of their internal relationships, and knew, or should have known, of the legal effect of these internal relationships. They knew who owned the companies, who managed them, who controlled the companies' labor relations, and what was the interrelation of operations between them. If they knew these things, they knew, or should have known that they constituted a single employer and alter egos within the meaning of the Act. It follows that an agreement by

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[15] Neither the General Counsel nor the Respondents introduced any evidence on those issues in the original complaints where there had been compliance with the settlement agreements.

HSR to bargain in good faith with the Union would necessarily include a commitment to bargain on behalf of CMT on the question of the preamble, i.e. who was to be named as an employer in the negotiations, and about coverage and the term of the collective-bargaining agreement under consideration.

By entering into the May 19, 1988 settlement agreement with the Union, and agreeing in that agreement to bargain in good faith, then by refusing, in September of that year, to bargain further because of the Union's insistence on the inclusion of CMT as a Party Employer, HSR has shown that it never had any intention of bargaining in good faith on that issue or of complying with that provision of the settlement agreement. The consistency between its conduct in 1987 which gave rise to the original charges of refusal to bargain, and in 1988 after the execution of the settlement agreement show that the Respondent HSR never had any intention of complying with the terms of the settlement agreement, arguing, rather, that the fact that the Union did not insist on including in the agreement a statement or admission that HSR and CMT were alter egos constituted a waiver of that position by the Union. I thus infer and find that HSR entered into the settlement agreement in bad faith and had no intent to comply with the agreement as it bound CMT and HSR as alter egos, *Norris Concrete Materials, Inc.*, 282 NLRB 289 (1986); *Jordan Graphics*, 295 NLRB 1085 (1989). See also *Quinn Co.*, 273 NLRB 795 (1984), and the Board's comments in *Auto Bus, Inc.*, 293 NLRB 855 (1989).

I find that Respondent HSR has failed to comply with paragraphs 1, 2, and 3 of the May 19, 1988 settlement agreement. Those paragraphs of that agreement are rescinded, the underlying charges in Cases 24-CA-5646, 24-CA-5675, 24-CA-5697, 24-CA-5722, and 24-CA-5765 are reinstated insofar as they alleged a refusal to bargain collectively and in good faith with the Union; and the complaints in Cases 24-CA-5646, 24-CA-5675, 24-CA-5697, and 24-CA-5722 are reinstated insofar as those

complaints alleges that Respondent HSR has failed and refused to bargain collectively and in good faith with the Union. *Davis Electrical Contractors, Inc.*, 291 NLRB 115 (1988); *NLRB v. Northern California District Council of Hod Carriers*, 389 F.2d 7212 (9th Cir. 1968).

With regard to CMT, I note that the evidence in this case shows that while CMT was and is an alter ego with HSR and TMCLP, CMT employed no employees in the period before the signing of the May 19, 1988 settlement. CMT's promises to hire 95 percent of the employees from the HSR bargaining unit for new positions at HIMA, and its undertaking to guarantee preference in seniority at HIMA to those employees were prospective, and were carried out. The promise by CMT to refrain from discrimination against new hires was also prospective in nature and, indeed, was no more than CMT was obliged under the law to do and to refrain from doing. CMT did not, as the evidence here shows, live up to this last promise, but whatever discrimination did occur was the subject matter of the charges and complaints in Cases 24-CA-5886, 24-CA-5889, and 24-CA-6030. Since CMT did not promise in the settlement to bargain in good faith, and since there were no allegations in the prior complaints specifically alleging discrimination against individuals. I see no useful purpose to be served by setting aside the settlement agreement between CMT and the Union. The remedy I have recommended below will adequately address the violations found as the result of allegations in the new, postsettlement, complaints.

B. *The Companies Involved*

1. Hospital San Rafael

The hospital was established, apparently in 1933, as an institution privately owned by a group of physicians. Some time around 1978 the equity in the hospital was purchased by two individuals, Dr. Jaime A. Soler Zapata and Dr. Jose A. Badillo

Quinones.[16] Soler and Badillo took title to the hospital through a holding company, San Rafael Planning, of which Dr. Soler owned 70 percent and Dr. Badileo 30 percent of San Rafael Planning, in turn, owned about 87 percent of the shares of Hospital San Rafael, with the remainder divided up among a number of other physicians.

Joaquin Rodriguez did not recall much about SRP, except that he was its president from about 1978 onward. There were no other offices or directors as far as he knew. He himself was never a shareholder, and the Company acted merely as a holding operation for the HSR stock which it owned.

In the period 1982 through 1988, Doctors Soler and Badillo continued to own 100 percent of the stock of SRP, which in turn owned about 87 percent of the stock of HSR. In this same period the Directors of HSR were:

Dr. Jaime Soler Zapata, Chairman
Dr. Jose A. Badillo Quinones, Secretary-Treasurer
Joaquin Rodriguez, Director

In this same time period the officers of HSR were:

Joaquin Rodriguez, President - January 1982 - November 1988
Enique Baguero, Administrator - January to June, 1982
Sonia Neives Arnau - Comptroler, January - May 1982
- Vice President May 1982 - February 1985
Simon Irizarry, Director, Auxiliary Services - January - March 1982
Fernando Rodriguez, Vice President - Operations 1982 - 1988

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[16] The findings in this section are taken from the uncontradicted testimony of Joaquin Rodriguez Garcia, and from documents produced by the Respondents under subpoena. I cannot say that I am convinced that Rodriguez was entirely credible in his testimony here, but in this area, at least, I have no problems with his candor and his memory.

Luis Baiz, Vice President - Auxiliary Services, April 1982 - 1988
Maria T. Dominguez, Administrater - July 1982 - 1988
Carlos M. Pineiro, Vice President, Finance - October 1984 - July 1985
Executive Vice-President - July 1985 - 1988
Irma Belavel, Comptroller - May 1987 - 1988
Cyril Olivierre, Vice President, Finance - January 1987 - 1988

2. Centro Medico del Turabo

Centro Medico del Turabo was established on August 30, 1978. At the beginning the principal shareholders of CMT were Dr. Soler, with 40 percent, Dr. Badillo with 20 percent, and Joaquin Rodriguez with 20 percent. Later, these amounts were reduced because of financial needs. As of May 16, 1988, Dr. Soler still held 37.8754 percent of the shares which had been issued, Dr. Badillo, Rodriguez, and Carlos Pineiro[17] each held 18.9377 percent of the issued shares, a total of almost 95 percent of the outstanding shares. There was, in May of 1988, an agreement between these shareholders and Kidder Peabody and Co. for the issuance of a number of additional shares which, if implemented, would have reduced the percentage of ownership in the four named shareholders to what I compute to be about 71 percent. Rodriguez testified that, although a prospectus was prepared for the sale of these additional shares, they never were sold, the percentages of ownership remained the same down to the time of this hearing in the summer of 1989.

During the times covered by the complaints in this case, the directors of CMT were:

Joaquin Rodriguez, Chairman

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[17] Pineiro received his shares as the result of a longstanding arrangement between himself and Rodriguez to share equally in all their endeavors. There is no evidence of this in the record beyond Rodriguez' own statement, but it is of no consequence to the events in this case.

Dr. Jaime A. Soler Zapata, Vice Chairman
Dr. Jose A. Badillo Quinones, Director
Carlos M. Pineiro Crespo, Director

Sometime later, Rodriguez was not sure of the dates, two additional directors were appointed, Rene Santos and Juan A. Chavez Abreu. Another directorship, to be filled by a member of the staff of the new hospital was also to be appointed, but this had not been done at the time of the hearing.[18]

The officers of CMT during the times material here were:

Joaquin Rodriguez, President
Carlos Pineiro, Executive Vice President and Treasurer
Jose A. Badillo, Secretary
Belinda Badillo, Assistant Secretary
Jose J. Vargas Cordero M.D., Vice President, Medical
Maria T. Dominguez, Vice President, Patient Services
Fernando A. Rodriguez, Vice President, Support Services

3. Turabo Medical Center Limited Partnership

Turabo Medical Center Limited Partnership was formed on June 10, 1980 under the laws of the State of Delaware. The general partner in this partnership is CMT and the sole limited partner is Joaquin Rodriguez.[19] There have been no changes in the make-up of the partnership since its formation. It does, of course, operate the new hospital under the name and style of Hospital Interamericano de Medicina Avanzada.

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[18] One Jorge M. Azize also served as a director between July 1987 and January 1989.

[19] This arrangement apparently was to be expanded through the sale of additional limited partnerships, but like the Kidder Peabody stock sales noted above, this one did not work out either. There is a lot of evidence in this record on the devices used by Rodriguez and the various corporate entities here to raise money for the construction of the new hospital. It eventually was done but not without considerable pain, aggravation and suffering.

4. The Relationship between the Companies

a. *Background*

When HSR was brought by Drs. Soler and Badillo in 1978 they found a serious financial situation. An audit showed that the hospital was losing money and was in danger of going into bankruptcy. The Doctors then called in Joaquin Rodriguez as a financial consultant.[20] When he became aware of the depth of the financial hole they were in, he wanted to resign, but was dissuaded with an offer to become the manager of the hospital. At this time it is not entirely clear, but I infer and find that Rodriguez became the President of HSR, and probably of SRP at the same time.

The hospital's money problems became further complicated when, about 6 months after Rodriguez took over, a Medicare inspection determined that the hospital did not comply with Medicare requirements, mainly because of an antiquated physical plant. The hospital was housed in five different buildings which had been combined. One of these buildings had been a supermarket, another a hotel. There were serious problems with the width of corridors, elevators, wiring, and what Rodriguez described as "a long list" of physical deficiencies. If the hospital failed to remedy these deficiencies, it would no longer be eligible to receive payments for treatment of Medicare patients, who, at that time, represented 44 percent of the occupants of the hospital.

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[20] I found Rodriguez to be highly intelligent, and intimately familiar with the corporations involved here, and the overall financial arrangements which eventuated in the construction of the new hospital. He was not so good on details or sequences of events, but I do not believe that affects his testimony on these preliminary matters. I, therefore, rely on his testimony, and the exhibits dealing with the financial history and dealing of HSR, CMT and the TMC Limited Partnership as set out in these findings.

The physical requirements imposed under Medicare rules would, according to Rodriguez, have made it necessary to tear down the whole place and rebuild from scratch. The management of HSR, accordingly, made a determination to build an entirely new facility. This decision apparently was made in 1978, and the initial planning was done by HSR itself, with the idea of continuing the same corporate entity into a new structure as Hospital San Rafael.[21]

By January or February of 1981, Rodriguez testified that he felt he was doing all the work in the planning for the new hospital (as well as managing the existing hospital); the doctors, (resumably Soler and Badillo) were not putting any money into the planning endeavors; and there was no money available from HSR to meet planning expenses. In these discouraging circumstances, somewhat surprisingly, Rodriguez decided that he wanted an ownership interest in the new hospital. The minutes of a directors' meeting of CMT on June 18, 1981, corroborate Rodriguez' account of his acquisition of 40 percent of the stock in CMT at about the time mentioned by Rodriguez in this testimony.

On March 15, 1982, two new agreements were made between Rodriguez and the two corporations, HSR and CMT, calling for increased wages and benefits for Rodriguez, as president and chairman of CMT and president of HSR. The 1982 agreements, which are practically identical save for the amounts granted, and the names of the companies, listed the salary and benefits which Rodriguez was to receive from each of the companies, and outline the duties he was to perform in consideration of that compensation. Rodriguez was to have "full responsibility," as chief executive officer of both CMT and HSR, to supervise day-

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[21] Based upon HSR's promises to build a new hospital, the secretary of health of Puerto Rico, who administers the Medicare program, agreed to waive, temporarily, the deficiencies at HSR, and allowed the latter to continue to operate for, as it turned out, over 10 years.

to-day operations of the corporations subject to overall policy decisions by the board of directors.

On October 10, 1982, the board of directors of CMT voted to offer the shareholders of HSR the opportunity to purchase at a nominal $1 per share, an equal amount of shares in CMT to the shares they already owned in HSR. These amounts were minor. By January 25, 1983, only six shareholders of HSR had become shareholders of CMT, representing only 5.32 percent of the stock. But this action does add to the evidence showing the close relations between the two corporations.

b. *The Connection between HSR and CMT.*

In conjunction with his bid to obtain a share in the ownership of the Company which employed him. Rodriguez argued to Drs. Soler and Badillo that they could not use HSR as a vehicle to move the new hospital project forward. As he put it, "we cannot use San Rafael, this cannot be a substitution of San Rafael, I want to have an interest in San Rafael, in the new hospital, and that means creating a separate corporation or something apart from San Rafael because no bank would lend money to San Rafael and no bank -- and the HHS (U.S. Department of Health and Human Services) in particular would not guarantee a loan, which is a condition that is essential to the building a hospital in Caguas --."

This explanation of the reason for the creation and existence of a new entity, which came to be CMT, was repeated in HSR's Domestic Corporation Report to the Commonwealth Department of State in April 1983, where in a section entitled "continuation of the Hospital as a going concern" the accounting firm responsible for the statement described Centro Medico del Turabo, a debtor[22] to HSR, as having been "organized by the shareholders of the Hospital's (HSR) parent (SRP) to build up a hospital to eventually

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[22] In the amount of $ 379,000 as of October 31, 1982.

replace the hospital's operations," continuing on to note that "subsequently Centro Medico transferred to an affiliated limited partnership the obligation of building and operating such Hospital, except that Centro Medico will be the only general partner and as such will have complete control of its operations."

The relationship between HSR and CMT occupied the attention of the HSR board of directors at its meetings in January 23, 1980, when Rodriguez notified his fellow directors, Soler and Badillo, of his efforts to get a series of notes approved which would assist in the financing of the new hospital and to allow HSR to recover advances made to CMT; on June 18, 1981 when there was considerable discussion on Rodriguez' salary and compensation, together with mention of a "contract" between HSR and CMT. If there ever was such a contract it was not introduced at this hearing. Thus, I must conclude that there was no formal agreement between the two, but that their relations were determined by the needs of CMT for advances to further the new hospital construction and the ability of HSR to fend off its continuing deficit and the threat of closure because of non-compliance with Medicare rules. Apparently HSR could remain open, under waivers, provided CMT contained [sic] to make progress in the construction of the new facility.

As far as contacts between the two, their boards of directors were the same three people, and their chief executive officers were the same person, Joaquin Rodriguez.

At a meeting of the HSR board of directors on February 1, 1982, a resolution was passed concerning some doctors who practiced or had privileges at HSR who were at the same time opposed to the new hospital.[23] After stating that HSR was

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[23] For some time in 1981 and 1982 there was another group in Caguas which was interested in building a new hospital to be known as "Caguas Doctors' Hospital." The two groups eventually worked out their differences and CMT

"taking all steps regarding the construction of new facilities which would be the Centro Medico del Turabo project," the resolution went on to state that any physician who engaged in the promotion and development of competing projects of CMT is caring out an activity," harmful to the best interests of Hospital San Rafael," and that such activity could result in their loss of hospital privileges at HSR.

Through this period, at least, it appears that Rodriguez, Soler and Badillo, among themselves, as directors of both, viewed HSR and CMT as a single entity for purposes of internal dealings.

This view of CMT as "related" to HSR is reflected also in the financial statements submitted annually by HSR's auditors to the secretary of State of the Commonwealth. Under the heading of amounts due HSR from "related parties" in each of those reports for the fiscal years ending October 31, 1982, to October 31, 1987, show an amount owed to HSR by CMT, beginning in the 1982 fiscal year, of $ 379,307 to $ 1,052,309 in fiscal 1987. Rodriguez testified that there was no interest paid on these advances. Indeed, there is no evidence in this record that those moneys were ever repaid at all.

Added to these advances from HSR to CMT was the sum of $1 million, representing compensation due HSR an account of HSR's agreement to relinquish its license, or franchise, to operate a hospital, so that TMCLP could obtain its own license to open and operate the new hospital. An agreement between HSR and TMCLP to this effect was executed on October 31, 1983. This transaction had been authorized by the shareholders of HSR at a meeting on June 28, 1983, the shareholders, expressly voting to relinquish the license for $1 million in cash. The license was duly surrendered, and the new hospital obtained its license to open. An agreement between HSR and CMT containing a schedule of

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bought out the Caguas doctors' group by a payment of $800,000.

repayment for a total debt of $41,370,698.56, including the $1 million due for the franchise, was executed on March 30, 1989, but there is no evidence that any money was actually paid. HSR went into bankruptcy on June 16, 1990.

The minutes of directors' and stockholders' meetings of CMT also show a concern for the relationship with HSR. At a directors' meeting on October 18, 1982, it was voted to offer shares in CMT to current shareholders of HSR in amounts equal to shares they then held in HSR.[24] At a meeting on May 20, 1983, the CMT Board voted to guarantee a loan to HSR in the amount of $ 300,000, and on June 24, 1983, the Board voted favorably on a motion to "convert" HSR to a wholly owned subsidiary of CMT by purchasing all of the outstanding stock and convertible debentures of HSR.[25]

In the HSR house newsletter "Hablemos" ("Let's talk"), articles written by Rodriguez during 1983 and 1984 speak of the new hospital in terms of "we" or us and identifying the new construction with the existing structure and its employees.

When communicating with a local bank an impression was given that HSR and the new hospital projects were part of the same enterprise. In a letter from Rodriguez on HSR stationery and dated March 25, 1980, addressed to Jose A. Luis Catto, assistant vice president of Banco De Ponce, in connection with additional financing, the letter swings from a rundown of HSR's balance sheet for the year 1979, to projections for the year 1980 and beyond, to a discussion of the new hospital, pointing out that "we are almost ready to submit our preliminary application --"

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[24] This offer was apparently accepted, but not until July 1987. The CMT board at that time voted to postpone acceptance of the offer and no more on the matter appears in the records offered in evidence here.

[25] This proposal sank from sight without a trace. Nothing more appears in the record on the matter.

(emphasis added). In another letter to Cotto, also on HSR stationery, and dated August 25, 1981, Rodriguez proudly announced that: "[Hospital San Rafael is going through a major expansion of its facilities. It will become Centro Medico del Turabo and it will be housed in a most modern and sophisticated medical facility to be constructed in Caguas --." On February 16, 1982, Rodriguez wrote to Juan A. Muntaner, also a vice president with the Banco de Ponce, describing a proposed sale by HSR of the hospital buildings so that they could "Transfer Hospital's physical asset to a corporation which is able to develop it *when the Hospital is transferred to Centro Medico del Turabo*." (Emphasis added.)

These letters show that attempts to obtain credit portrayed HSR and CMT to the lender as one and the same aspiring debtor.

c. *Managers and employees*

The boards of directors of HSR and CMT were, during most of the period relevant to the issues here, composed of the same three people, Joaquin Rodriguez, a director of HSR and chairman of the board of CMT, Dr. Jaime A. Soler Zapata, chairman of HSR and a director of CMT, and Dr. Jose A. Badillo Quinones, a director of both companies. At some later time Carlos M. Pineiro Crespo was named a director of CMT, and still later, two others were appointed.

The Management of both HSR and CMT was headed, during the whole period covered by these cases, by Rodriguez. Pineiro began at HSR as vice president for finance in October 1984, then was appointed executive vice president, where he remained until late 1988 when the [sic] assumed the job of executive vice president at CMT and ran the operations of HIMA until the contract with CHA became effective at the end of October 1989.

The next level of management consisted of Cyril Olivierre, vice president for finance and HSR from January 1987, then became

senior vice president for finance and administration for CMT; Maria T. Dominguez, administrator (for day-to-day operations) of HSR from July 1982, then vice president in charge of patient services at CMT; Fernando A. Rodriguez, vice president for operations at HSR, and vice president for support services at CMT.

Others who made the transition were Felix Ortiz Collazzo, director of human resources and industrial relations at HSR, who became the general administrator at HIMA; Eladio Cartagena, house counsel at HSR, and then at HIMA; and Arelis Veintidos, who was a secretary at HSR, became executive xecretary to Carlos Pinerio at HSR, then left HSR, went to work for Triangle Engineering, the construction manager for HIMA, where she was in charge of receiving all applications for employment at HIMA, then screening and interviewing applicants and recommending that they be, or not be, hired. When HIMA opened, Ms. Veintidos became assistant director of the department of human resources at HIMA.[26]

A list of management and supervisory people at HIMA was stipulated to by the parties and entered into evidence here. Of the 102 names on this list, including the management people named above, 85 were employed at HSR before joining HIMA.

At the professional level (not involved in the professional unit of registered nurses) the physicians working at HIMA in 1989, shows them to be substantially the same persons who were attending patients at HSR in 1988.

Finally, from a list of employees in the two bargaining units here, prepared by HIMA as of October 17, 1989, I have calculated that as of December 31, 1988, a total of 138 employees

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[26] There was no director at the time of this hearing, so Veintidos was actually running the department.

has been hired by HIMA in jobs contained within those units, of whom 92 had previously worked for HSR. Breaking it down to the separate units, I find that of 58 persons hired in the registered nurse unit, 31 were former San Rafael employees.[27]

d. *Labor relations*

Carlos Pineiro testified that during the 1987 negotiations between HSR and the Union he, as executive vice president of HSR was delegated by the board of directors the function of establishing policy in this area. He then went on to develop and implement labor relations policies. There is no direct testimony that Pineiro was assigned the policy function for labor relations at CMT, but during 1988 he was also the executive vice president for CMT. He was responsible for placing Arelis Veintidos, his secretary, who had obtained a Master's degree in industrial relations, first in a position at Triangle Engineering where she received and screened all applications for employment at the new hospital, and then, when HIMA opened, she was transferred there as assistant director of the department of human resources. While in this last position, the record here shows that she handled most if not all personnel and employee relations functions. Pineiro was at least up to the effective date of the contract with Caribe Hospital Affiliates, the executive vice president of CMT and in charge of all management operations at HIMA. He was also, concurrently, a member of the board of directors of CMT. Thus, I think an inference is warranted that Pineiro continued to set policy, subject to approval by a majority of his fellow directors, for CMT and its subsidiaries, TMCLP and HIMA.

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[27] This does not, of course, include the registered nurses, Norma Flores, Isabel Arriaga, and Carmen Merced, alleged discriminatees who were not hired by HIMA, and whose situations will be considered herein.

e. *Conclusions*

The Third Circuit has set out the essence of the single employer doctrine in stating:

> A "single employer" relationship exists when two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a "single employer." The question in the "single employer" situation is whether the two nominally independent enterprises, in reality, constitute only one integrated enterprise, [*NLRB v. Browning - Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982).]

Over the years the Board has established criteria to be used in determining whether a single employer relationship exists. As affirmed by the Supreme Court in *Broadcast Technicians Local 1264 IBEW v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965). the criteria are "interrelation of operations, common management, centralized control of labor relations and common ownership."

The General Counsel has alleged that CMT and HSR are alter egos, and the former is in fact, a disguised continuation of the latter enterprise. Like the single employer question discussed above factors to be considered are (1) interrelations of operations; (2) common management; (3) common ownership; and (4) common control of labor relations. The Board has generally found alter ego status where the two enterprises involved are found to have substantially identical management, business purposes, operations, equipment, customers, and supervision, as well as ownership. *Crawford Door Sales Co.*, 226 NLRB 1144 (1975); *Denzil S. Alkire*, 259 NLRB 1323 (1982); *Advance Electric*, 268 NLRB 1001, 1002 (1984). In this last case, the Board stated clearly that "we generally have found *alter ego* status where two enterprises have 'substantially identical' management,

business purpose, operation, equipment, customers and supervision, as well as ownership."

A further, and critical, consideration to the finding of alter ego status, is whether the new company was created "to evade responsibilities under the Act." *Fugazy Continental Corp.*, 265 NLRB 1301 (1982). As the Third Circuit stated in *NLRB v. Al Bryant, Inc.*, 260 NLRB 128 (1982), *enf'd* 711 F.2d 543 (3d Cir. 1983), *cert. denied* 464 U.S. 1039 (1984), while the focus of the single employer doctrine is the absence of an arm's-length relationship between companies, the focus of the alter ego doctrine is "the existence of a disguised continuance or an attempt to avoid the obligations of a collective-bargaining agreement through a sham transaction or a technical change in operations."

It does not appear to me that there is a real question of fact concerning any of these standards.

There is common ownership in that the two doctors, Soler and Badillo own 87 percent of the stock in HSR, along with some minority shareholders. The same two doctors own about 60 percent of the stock in CMT, with some larger holdings, a little over 18 percent each by Joaquin Rodriguez and Carlos Pineiro, with, again, some minority shareholders. Thus, the doctors control a majority of shares in both corporations. TMCLP and HIMA are, of course, instruments of CMT.

There is common management. Since 1978 Joaquin Rodriguez has exercised executive control over both HSR and CMT. This conclusion is based upon Rodriguez' own testimony about how he took charge of HSR in 1978; was responsible for the creation of CMT at that time; and acted as president and chief executive officers of both HSR and CMT during all of the period covered by this case. The correspondence and documents entered here are either from or to these corporations is mainly directed to or signed by Rodriguez, except in a few instances. The testimony of union officials Alvarez and Gonzalez, employee Milton Suarez, and

Managers Pineiro, Ortiz and Cartagena, all shows that Rodriguez was and is the boss and all policy is determined by him, or by him with his managers.

There is common supervision. As I have already noted, the same management people from the top level, Rodriguez and Pineiro, the middle level, Ortiz, Veintidos, Cartagena; and the lower level, the 85, more or less, out of 102 supervisors and department heads, all moved from HSR, as it was closing, to the new hospital.

There is a common business purpose and customer base. While at a hospital patients come and go, HIMA is located in the city of Caguas, and was built and designed to serve the same, maybe a somewhat larger area. The type of service and the area in which it is performed remain basically the same.[28]

The operations of the two hospitals were not interrelated in the sense that they functioned as a team, is or a synchronized manner. It is true that HIMA did purchase equipment from HSR, and that equipment was transferred to HIMA along with management, administrators, professional, technical and nonprofessional employees, but these transfers were not made in a context of continuing coordinated or integrated operations, but on account of the discontinuance of operations by the one, and assumption of operations by the other.

In this case, despite the facts I have found above concerning its relations with HSR made to its offices and directors, its employees and to outsiders, CMT continuously and adamantly refused to admit its relationship with HSR to the Union. In a letter of April 15, 1987, responding to a request by union delegates at HSR, Rodriguez parried the delegates' request to discuss the

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[28] The fact that HIMA is larger, more elaborate, more modern and better equipped makes a difference in degree, but not in kind, of the services offered.

transfer to CMT by referring them to Pineiro and stating that it was premature to talk about CMT since they had not yet secured their financial requirements. Later, as the 1987 negotiations began, the representatives of HSR refused to discuss the application of any contract to CMT,[29] and that refusal was reflected in the conversation between Pineiro and Gonzalez on October 27, 1987.

As I have noted above in connection with the setting aside of the settlement agreement, the Respondents here were in a position to know all of the facts about their relationship. The development of the new hospital was ongoing for at least 10 years, from 1978 to 1988. Both HSR and CMT have employed learned and skillful labor counsel during this period. It thus seems to me clear that the Respondents knew, or reasonably should have known what the legal effect of that relationship was and is. To continue to insist that these two corporations are, in effect, strangers to each other leads me to the conclusion that the new company, even though it may have been created initially in order to avoid the credit problems encumbering HSR,[30] became a "device to evade responsibilities under the Act;" *Fugazy Continental Corp.*, supra. Therefore, I find that HSR and CMT are a single employer and alter egos used in this case to attempt to avoid continuing bargaining obligations under the Act.[31]

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[29] Letter of Felix Ortiz to Luis Alvarez dated July 29, 1987.

[30] CMT was incorporated in 1978; some five years before the Union came into the picture at HSR.

[31] At the same time the fact that these two companies were not actual employers at the same time does not affect the conclusion that they are a single employer within the meaning of the Act. *Overton Markets*, 142 NLRB 615, 619 (1963).

f. *The successorship issue*

The General Counsel has maintained throughout this proceeding that if it is found that HSR and CMT are not a single employer, or alter egos, then, in the alternative, CMT is a successor employer to HSR, and is obliged to bargain with the Union as the representative of its employees who were formerly employed at HSR in the previously certified appropriate bargaining units.

It was in pursuit of this theory that the Regional Director for Region 24 filed a petition with the United States District Court for the District of Puerto Rico under Section 10(j) of the Act seeking to enjoin CMT (and Joaquin Rodriguez) from refusing to bargain with the Union and from failing to employ one Milton Suarez, a former employee of HSR. As I have noted, above, in the introduction, the judge, Honorable Carmen Consuelo Cerezo, issued her opinion and order on August 8, 1989, ordering the Respondents CMT, Rodriguez, TMCLP, and HIMA, pending the final determination of these matters before the Board, to refrain from failing and refusing to recognize and bargain with the Union as the bargaining representative of a unit of licensed practical nurses and technicians,[32] and that the employers bargain in good faith with the Union and reinstate Milton Suarez to his former or substantially equivalent position.

The facts as found by the Judge, based on affidavits filed with the court are entirely consistent with the facts I have found here, based upon the testimony of witnesses and from documents introduced by the parties. As the Judge pointed out:

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[32] For some reason not explained in the record, the judge's findings were based only on the "technical" unit, leaving out any mention of the "professional" unit of registered nurses. The inclusion or exclusion of the professional unit, however, does not change the facts of the successorship question as found by the Judge or as found here.

In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 107 S.Ct. 2225 (1987), the Supreme Court recently clarified its earlier ruling in the area of successorship in the case of *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). Approving the Board's approach to these cases, the Supreme Court stated that the focus is on whether there is "substantial continuity" between the enterprises, which depends on (1) whether the new company has acquired substantial assets of its predecessor; (2) whether the business of both employers essentially the same; (3) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (4) whether the new company has the same production process, produces the same products, and has basically the same body of customers. *Fall River*, 406 U.S. at 43. Of Paramount [sic] importance in making this determination is whether, from the employees' perspective, their job situation remains essentially unchanged. Id. (TMCLP)

In the instant case, Respondent acquired from the predecessor (HSR) the right to operate a hospital in the Caguas area through the License Surrender Agreement for a consideration of $1 million, $242,602 worth of equipment, and the lease of the PMX Mobile X-Ray Unit. The License Surrender Agreement in particular, represents the acquisition by Respondent of a significant asset. Although Respondent did not purchase the predecessor's deteriorating physical plant and out dated equipment, it nevertheless acquired sufficient assets from San Rafael to meet the first test. See *Landhill Press*, 282 NLRB 378 (1986).

Petitioner (Regional Director) has also shown, and Respondent does not seriously contest, that HIMA meets the remaining criteria for successorship. Both San Rafael

> and Respondent are hospitals and health care institutions and, as such, operate the same business. Respondent also provides health care services to the same community previously served by Hospital San Rafael, and its employees are doing the same jobs under the same working conditions and supervisors.
>
> The "substantial continuity" between these institutions is particularly established in the instant case by the fact that HIMA was conceived from the beginning as a replacement for Hospital San Rafael. The employees of San Rafael were informed of that fact throughout the regular updates on the on the [sic] plans for the new facility contained in the publication "Hablemos." Since Respondent made a commitment to the Union hire 95% of the San Rafael employees at HIMA and give them preferential seniority over other employees, it is reasonable to conclude that, from these employees' perspective, their job situation at HIMA remains unchanged. In view of the above, this Court finds that there is reasonable cause to believe that Respondent is the legal successor to Hospital San Rafael. [*Asseo. v. Centro Medico del Turabo, Inc. et al.*, U.S.D.C. Puerto Rico Civil 89-0490CC, Aug. 8, 1989, pp. 12 - 13.]

While I am not precluded from making findings contrary to those the judge has made here, my own independent evaluation of the evidence here has led me to the same findings and conclusions.

I can add to this only my finding that these facts show that CMT, and its subsidiaries TMCLP and HIMA, are the successor employer to Hospital San Rafael.

C. *The Alleged Unfair Labor Practices*

1. The refusal to bargain, 1987

All of the preceding has been necessary to establish the somewhat complicated procedures which took this case through the initial charges, the first 2 days of hearing and the May 19, 1988 settlement agreements; the alleged violations of the settlement agreement and the filing of new charges; identification and delineation of the several corporate, partnership and subsidiary parties to the proceeding; and the legal relationships between these parties. Having now set out what I find these relationships to be, I can proceed to narrate the facts surrounding the alleged unfair labor practices.

The Union organized the employees of Hospital San Rafael during 1983 and on January 20, 1984, a majority of HSR employees in the following two units selected the Union as their collective-bargaining representative. These units were certified by the Regional Director on January 30, 1984.[33]

> A) Included: All registered nurses and pharmacists employed by Respondent at its hospital located in Caguas, Puerto Rico.
>
> Excluded: All other employes, office clerical employees, guards and supervisors as defined in the Act.
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> B) Included: All licensed practical nurses and technicians employed by Respondent at its hospital located at Caguas, Puerto Rico, including escorts: EKG technicians; Respiratory Therapy technicians; X-Ray technicians; Operating Room Technicians; Dietary Technicians; Medical Records

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[33] The Respondents have denied that these units are appropriate herein. However, Respondents have the burden to show that the units are no longer appropriate and have failed to do so. *Indianapolis Mack Sales & Service*, 288 NLRB 1123 fn. 5 (1988). Cf. *New London Convalescent Home*, 274 NLRB 204 (1985), *enf'd*, 815 F.2d 517 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 140.

Technicians; Admission Clerks; Record Room Clerks; X-Ray Clerks; Diet Department Clerks; Respiratory Therapy Clerks; Pharmacy Clerks; Operating Room Clerks; Emergency Room Clerks; Ward Clerks; and Pharmacy Auxiliaries.

Excluded: All other employees, office clerical employes, professional personnel, guards and supervisors as defined in the Act.

Following the certification the Union and HSR negotiated a collective-bargaining agreement to be in effect from September 1, 1984, to August 31, 1987.

On August 28, 1985, Luis Alvarez Colon, vice president of the Union Nacional de Trabajadores de la Salud, wrote to Felix Ortiz Collazo, director of personal of HSR informing him of the names of the delegates (or stewards) for the Union at HSR. The general delegate was Milton Suarez, who worked in the X-Ray department. Also included as delegates were Norma Flores, Carmen Merced, and Delia Diaz, with 14 other employees in various departments.

On May 15, 1987, Henry Nicholas, president of the Union, wrote to Ortiz informing him that it was the intention of the Union to enter into negotiations for a new contract and requesting a meeting as soon as possible. On May 27, Ortiz, in turn, wrote to Alvarez expressing the interest of the hospital in negotiating a new contract and requesting that Alvarez send him a copy of the Union's proposals for study. Ortiz concluded by stating that the Company would study the proposals, and then communicate with the Union about a date to negotiate. Alvarez replied on July 20, enclosing a proposed contract and suggesting July 24 for a meeting.[34]

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[34] This proposed contract consisted of 37 articles in 52 pages. I have not compared this document to the 1984-1987 contract, but as matters turned out, the content of the new contract proposals is not important.

When the Union's proposals were received, Ortiz was apparently on vacation, so Carlos M. Pineiro, executive vice president of HSR, replied on July 22, asking for more time to study the proposals, and suggesting August 4 for a meeting. On July 29 Ortiz, back from vacation, had gone over the proposals and wrote the [sic] Alvarez complaining that the proposals were unreasonable, unacceptable, made in bad faith, and economically unrealistic. Further, Ortiz stated "We want to establish clearly that Hospital San Rafael is not going to negotiate, and cannot negotiate for, or in representation of, Centro Medico del Turabo. If you have any claim with any other organization, you should address that organization.

"Your certification as a union representative, as far as we are concerned, is only for Hospital San Rafael purposes. If you or your organization seriously desire to negotiate with Hospital San Rafael, you should start by submitting a proposal to this entity without including third parties." Ortiz returned the Union's proposal and informed Alvarez that he would wait for a new proposal to schedule a meeting date. There was further correspondence during August, culminating in a letter from Ortiz to Miguel Gonzalez Vargas, who was then representing the Union, stating that HSR would not negotiate if the Union continued in its effort to negotiate with CMT mentioned in the contract.

This (along with some other matters which were settled informally by the May 19, 1988 agreements) led to the filing of charges and to the first days of hearing in this matter at which time the May 19, 1988 settlement agreements were executed.

I have set aside the settlement agreement between HSR and the Union, and reinstated the charges and the complaint alleging that HSR had refused to bargain in good faith by refusing to bargain unless the Union deleted references in its proposals to CMT.

I have found that HSR and CMT were and are alter egos, basically the same person for purposes of labor relations law.

I, therefore, find that HSR, by insisting upon the deletion of the name of its alter ego from the Union's bargaining proposals, and by insisting on the exclusion of the alter ego from the bargaining process, HSR has violated Section 8(a)(1) and (5) of the Act. *Preterm, Inc.*, 240 NLRB 654 (1979).[35]

Finally, on January 14, 1988, in a conversation with Gonzalez, Ortiz stated that the hospital no longer recognized the collective-bargaining agreement (which had expired on August 31, 1987) and would in effect, no longer recognize the Union. I find this also to be a violations [sic] of Section 8(a)(1) and (5) of the Act.[36]

2. The refusals to bargain, 1988

After the execution of the settlement agreements on May 19, 1988, the Union and HSR met again to continue bargaining for a

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[35] After receiving the August 10 letter, the Union revised its proposals to delete references to CMT. But at the first negotiating session, held on August 14, 1987, the Union wanted to talk about a 3-year agreement, and HSR wanted to talk about the effects of its closing in 1988. In October, the Union, in a letter to Joaquin Rodriguez, president of both HSR and CMT, reiterated its position on a 3-year contract. Rodriguez replied that CMT would not participate in any negotiations nor would it recognize the Union. In this, too, I find that HSR has violated Section 8(a)(1) and (5).

[36] Two decertification petitions had been filed by an individual in the two units here, Cases 24-RD-350 and 24-RD-351, about January 13, 1988. Because of the pendency of Unfair labor practice charges the Regional Director dismissed the Petitions. This action was upheld by the Board under date of April 6, 1988. During the hearing in this case, counsel for Respondents objected to the fact that these petitions were not further processed after the settlement agreements had been executed on May 19, 1988. But, "where an employer, pursuant to a settlement agreement, has agreed to bargain with the union, the employer must bargain with the Union for a reasonable time, and no question concerning representation can be raised during this period; *Shangri-La Health Care Center*, 288 NLRB 344 (1988); *Poole Foundry & Machine Co*, 95 NLRB 34, 36 (1951); *Freedom WLNE-TV*, 295 NLRB 634 (1989). Thus, no decertification petition could have been entertained in the period between the signing of the settlement agreements in May, and the subsequent refusal to bargain in September 1988.

new contract to replace the agreement which had expired on August 31, 1987. The first session was held on June 15, 1988, at the Governmental Center in Caguas. Representing HSR were Attorney Godwin Aldarondo Girard, Attorney Eladio Cartagena Colon, and Felix Ortiz Collazo, and present for the Union were Miguel Gonzalez Vargas, Milton Suarez Collazo, Delia Diaz Gonzalez, and possibly Carmen Merced Baez, Ernesto Rivera, and Attorney Perez Munoz.

According to Miguel Gonzalez, the Union attempted to steer the discussion to a 3-year contract which would carry over to the new hospital, and the Company wanted to talk about the closing of HSR. They did discuss some of the issues left over from previous meetings, but came to no agreements, even though, in Gonzalez's words, they were "getting near" on some of them.[37]

A second, or third, meeting was held on September 14 again at the Governmental Center in Caguas. This was a longer meeting and we have in evidence a transcript, in Spanish and English, of a tape recording made by Respondent at the meeting. Almost the same cast was present. Aldarondo, Cartagena, and Ortiz for the Company, Gonzalez, Suarez, and Merced, with one Nestor Rivera, for the Union. After some considerable discussion the discussions again broke down over the question of including CMT in the agreement as a party employer. At the end, HSR insisted that the question be settled before anything else could be discussed. Attorney Aldarondo insisted that it was "essential in that the Union admits in the Agreement that the employer is the Hospital San Rafael, Incorporated" -- "and is the only employer in this case." With that, Aldarondo stated that he was going to take up the matter with the Board, and he bade the Union a "good

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[37] Attorney Cartagena testified about a short meeting which was held on June 7, at which an attorney for the Union named Santiago asked the hospital representatives to bring in (proposals on) some points which he then discussed.

afternoon." There were no further meetings between the Union and representatives of HSR.

There was, however, additional correspondence. On September 16, 1988, Alvarez sent a letter to Joaquin Rodriguez as chairman of the boards of both HSR and CMT inquiring about the opening of the new hospital and the promised hiring of 95 percent of the employees at HSR. Receiving no answer to this, Alvarez sent a reminder on October 14, requesting that Rodriguez furnish the information requested on September 16.

On October 25, Rodriguez replied to the October 14 letter, on a CMT and TMCLP letterhead. He reiterated the view that "this limited partnership (TMCLP) and the corporation owner of Hospital San Rafael are two entirely separate and independent entities." Then, waxing poetical," whose destinies are like parallel lines."[38] Rodriguez pointed out that the Union, and Alvarez himself, had acknowledged this fact at the Labor Board. He then referred Alvarez to Pineiro for any discussion of matters concerning HSR. Rodriguez did indicate that CMT would honor its promise to hire the 95 percent of unit employees, and said that CMT was engaged in obtaining permits in order to open.

With respect to Pineiro's position, I note that 2 days after the October 25 letter was dated, Gonzalez and Milton Suarez visited the new hospital where they met Pineiro. He invited them into an office, where, in response to a question from Gonzalez, about working conditions there at the new hospital, he replied that the hospital did not recognize any union, and that there was no relationship between this hospital and HSR. Gonzalez then asked Pineiro if he was speaking for CMT, and Pineiro replied that he was not working for CMT and that he was there, like them, as a "visitor."

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[38] It sounds better in the original Spanish: "Cuyos destinos son como lineas paralelas."

On December 19, 1988, Alvarez wrote to Rodriguez, as president of HIMA, requesting a negotiating meeting, and protesting the refusal to recognize the union, changes in working conditions, and the refusal to recall union delegates to positions at HIMA. Rodriguez replied to this letter on January 5, 1989, reiterating his position that the settlement agreement had put the question of recognition to rest. On the same date Attorney Heber Lugo Rigau also wrote to Alvarez, adding his opinion that the matter of recognition of the Union by CMT and its subsidiaries was settled in May of 1988 by the settlement agreements reached at that time.

Since HSR and CMT are alter egos, I find violations of Section 8(a)(1) and (5) here in the refusal by the "HSR" negotiators to bargain further on September 16, 1988, unless the Union agreed to a clause which limited the scope of the agreement to HSR, and did not include CMT. I find further violations in the refusals by Rodriguez in his letters of October 25 and January 5, Lugo's letter of January 5, and Pineiro's refusal in person on October 27 to recognize the Union as bargaining representative for employees of the new hospital, HIMA.[39]

3. The transition and hiring process

The transition from Hospital San Rafael to Hospital Interamericano de Medicina Avanzada took place on November 13 and 14, 1988. By November 14, almost all of the employees of HSR, save a few in medical records who were in the units involved here, and others concerned with closing down the facility, who were not involved in these cases, had either been laid off, or had transferred to the same or similar positions at HIMA.

The movement of HSR employees to HIMA, even where they merely moved their location, but continued to perform the same

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[39] See discussion, above, and *D.I.C. Mfg. Co.*, 294 NLRB 426 (1989).

functions, was not automatic. For some months before the move, Arelis Veintidos, who had been the secretary to Carlos Pineiro, executive vice president of HSR, was working as office manager for the Triangle Engineering, construction manager at the HIMA jobsite. While she was there[40] Pineiro noted that she was performing well, and he talked to her about a human relations position at HIMA.[41] It was then arranged that Veintidos would hand out applications for people interested in employment at HIMA. Later, on [sic] August 1988, this assignment was broadened to include interviews and screening of applicants. After HIMA opened, another person was hired to handle applications and, Vientidos moved out of the trailer and into the position of assistant director of human resources. She continued, according to Pineiro, to screen and review applications from former HSR employees.

4. Substantial and representative complement

Under the General Counsel's alter ego theory, with which I agree, with the opening of the new hospital, the bargaining obligation which existed between the Union and HSR continued

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[40] Testimony on this came from Pineiro, but at no time was any reason given to explain why Veintidos was working for Triangle. Pineiro said that she had obtained a Master's degree in industrial relations and did not want to be a secretary any more. But that does not explain why she left what must have been a very responsible position at HSR to go to work at what must have been a clerical job, of a temporary nature, in a construction trailer on the HIMA job site. Veintidos testified in this proceeding, and impressed me as extremely alert and capable. She could have handled the office manager job in the trailer, or any other job, but it is more likely that her separation from HSR and CMT and her involvement in the hiring process for HIMA while ostensibly working for Triangle was to try to avoid any link between HSR and CMT in that hiring process. I, therefore, infer and find that Veintidos was assigned to Triangle as an agent for both HSR and CMT to control the hiring process at CMT-HIMA without ascribing responsibility to HSR.

[41] At this time, of course, Pineiro was still executive vice president of HSR. The fiction of the separation of HSR and CMT is apparent here.

undiminished. The new hospital was obliged to maintain at least the same level of wages and benefits, and it was required to negotiate with the union any changes in wages, hours, or working conditions: *C.E.K. Industrial Mechanical Contractors,* 295 NLRB 635 (1989).

The General Counsel's alternative theory that CMT is the successor employer to HSR I have already found to be valid. Having found that, I must also find that CMT employed a majority of former HSR employees in order to further find an obligation on CMT to bargain with the Union. *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27 (1987). The Board has determined that this majority must be shown to have existed when hiring of the successor operation has reached a "Substantial and representative complement" of ultimate employee complement.

The new hospital opened on November 19, 1988, with 50 beds available. By November 19, as the district court found in the 10(j) case cited above, the job classifications for HIMA were substantially filled, at a time when most of the former HSR employees had been hired. The court further found that the total number of employees in the technical unit had reached 73 percent of the total number the hospital expected to hire when it reached a 150-bed level of operations. The judge found this number to be equivalent to the first shift, used as a benchmark by the Supreme Court in *Fall River*, 482 U.S. at 52. While this projection by the hospital turned out to be unrealistic, the judge found that the technical employees hired by November 19, 1988, still represented 64 percent of the actual number of employees hired by April 15, 1989, when it was close to the 150-bed level of operations.[42] I

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[42] My figure, based on an exhibit prepared by Respondent CMT and introduced by the General Counsel as G.C. Exh. 130, shows 64 people employed in the technical unit as of November 19, 1988, and 112 (from R. CMT Exh. 10) employed in this unit on April 15, 1989. The percentage in that case would be 57 percent. My figures may not be accurate, because the parties stipulated that

concur with the court's view that "it is reasonable to conclude that Respondent (HIMA) had reached normal operations by November 19, 1988. Compare *Hospital San Francisco*, 293 NLRB 171, 172 (1989), with *Myers Custom Products*, 278 NLRB 636 (1986).

Since CMT employed 69 people in the technical unit as of November 19, out of which 51, or 74 percent were former HSR employees the Union is entitled to a rebuttable presumption among those employees in that unit.

For some reason which is not clear to me in this record, there are no references in the judge's decision, nor in the General Counsel's brief, to Unit A, the professional unit of registered nurses in the analyses by the judge and the General Counsel of the Union's majority status as of November 19, 1988. Of course, if the Board adopts the alter ego theory discussed herein, Union does not need a majority in the professional unit, but if the Board chooses to proceed on the successorship theory then there is a question of whether the Union had a majority at a time when a substantial and representative complement of registered nurses had been hired. Using the criteria established in her case by Judge Cerezo, and argued by the General Counsel, and drawing the data from General Counsel's Exhibit 130, I find that as of November 19, 1988, CMT had hired 36 registered nurses for HIMA, of when [sic] 30 were former HSR employees.[43] If the same

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as of November 19, 1988, HIMA employed 69 people in unit B, of whom 51 were former HSR employees. Since this is what the parties say is so, I will use this figure in computing the percentage of former HSR employees as of that date.

[43] I would note that as of December 31, 1988, there were 58 nurses in the unit, and 31 former HSR employees. Between then and April 15, 52 more were hired, but only three former HSR nurses. There were no allegations of discrimination, except for three nurses whose situations will be considered herein, so it would seem that they just ran out of former HSR nurses because of the proposed increase from 102- to 300-bed capacity, or because of higher standards for care, requiring, proportionally, more RN's to attend to the patient care required.

standards are followed here, as with the technical unit, it appears that the Union did achieve a majority in a substantial and representative complement by the November 19 date.

The Union here, by personal request from Gonzalez to Pineiro on October 27, and by letter from Alvarez to Rodriguez on October 14, requested that CMT recognize the Union. The failure of CMT to recognize and bargain with the Union constitute further violations of Section 8(a)(1) and (5).

In addition, CMT, by unilaterally imposing new and different working conditions on its employees further violated Section 8(a)(1) and (5).

5. The individual discriminatees

a. *Milton Suarez*

Milton Suarez began work as an X-Ray technician at HSR in 1980. In 1983, Suarez contacted the Union and began to organize the technical and professional employees at the hospital. In July 1983 Suarez was discharged. He went to see Eladio Cartagena, who at that time was temporarily filling the job of personnel director, Cartagena told him that he was being fired "for organizing meetings to bring the union to the . . ., with the employees to bring the union in to the hospital." After this Suarez continued his organizing efforts outside of the hospital and served as a union observer at the election in January 1984. Later, after charges had been filed with the Board, a settlement was reached and Suarez was reinstated in his job at the hospital. He participated in the negotiations which resulted in the 1984 - 1987 contract, and was selected by the Union as general delegate (chief steward) for the hospital.

Suarez also participated in the negotiations with the hospital during 1987 and 1988, and in protest meetings and picketing while these negotiations were going on. At one of these demonstrations, an unsuccessful effort in October 1988 to persuade a number of

employees to picket in front of HSR, Suarez, together with Norma Flores, Isabel Arriaga, and Carmen Merced, were observed by hospital managers and supervisors including Felix Ortiz, Ellen Keiser, director of nursing, Efren Martinez, medical director, Eladio Cartagena, and others. According to Suarez, and Merced and Flores who also testified about this incident, some hospital employees were frightened by the supervisors watching them, and did not participate in the demonstration. In the end, only those four participated in this demonstration.

Suarez testified that he became aware of the plans for a new hospital in 1981 or 1982. He did not indicate that this had anything to do with his organizing efforts in 1983, but it is clear from the record that the employees of HSR were concerned about what would happen to them when HSR closed and the new hospital opened. After the certification of the Union in January 1984 and the execution of the first collective-bargaining agreement later that year, that concern became an institutional as well as a personal matter. By the summer of 1985 relations between management, the Union and the employees became strained. On August 30 Rodriguez addressed a memorandum to the employees of HSR attacking Milton Suarez and the Union. The memorandum is important enough in illustrating Rodriguez' feelings toward the Union and its activities to warrant including it in its entirety here:

> The famous "UNTS," under the director of "Mr. Knows it all" Milton Suarez, Head Steward of that Union, has begun a campaign against the Hospital and now they say that the Hospital is the one which has started a "Destructive Campaign toward the workers" unity. As I do know what their purpose is, other than the patients be admitted to another hospital - somewhere else - in which case the employees of San Rafael will need to be sent to that other place -, I want to clarify other *lies that they are saying*.

Lie # 1 - ***THAT WE WANT TO DESTROY THE WORKERS' UNITY***

I ask myself, are the workers united to scare away the patients from the Hospital so they go to other hospitals? You do not have to be a genius to know that if the Hospital is accused in public that the patients are being given a deficient service (something that you know is a lie). the [sic] only thing achieved is to destroy the Hospital's image: an image that has taken us too long to recover after the Hurricane Castellon.[44]

"TRUE: What we do not want is that there be "unit of workers" to mess up the table where ***ALL OF US*** eat. We do not need this and if that is what the UNTS is . . . . we do not want it.

LIE # 2 - THAT WHEN THE EMPLOYEES OF HOSPITAL SAN RAFAEL ARE TRANSFERRED TO THE ***VERY NEW ONE*** THEY ARE GOING TO LOSE THE BENEFITS THAT THEY NOW HAVE.

TRUE: In order to clarify once and for all this myth, I tell you, on behalf of Hospital San Rafael and of Centro Medico del Turabo -- in which neither Milton nor the UNTS have put one even one -- that your jobs are secure. That you are going to be transferred without further ado . .. . with the same salary (or more, because by then you must have had several additional raises, that the Hospital will pay you and not the UNTS and much less Milton), without probationary period and *with all the same benefits*.

Already in a previous occasion, I made a similar promise. You will remember that in 1982 I promised every one who

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[44] This does not refer to a tropical storm, but to one Rudy Castellon, a former owner of the hospital, whom Rodriguez blamed for many of its financial problems at the time he took over.

was going to be affected by the instalation [sic] of the computers that nobody would be left without a job. I ask you; was someone dismissed? Who are you going to believe, Milton, the UNTS, or me?

We suspended Milton and Berrios because they were distributing leaflets in the Hospital as if we were still in an election campaign [sic] and violating a specific disposition which was known to every one. How much longer are we going to tolerate the UNTS to do whatever they want to in the Hospital? We have been liberal enough. We have let them distribute all kinds of communications while they have been in campaign (as approved in the ***NO SOLICITATION, NO DISTRIBUTION*** rule) but, why do we have to do it now?

The UNTS is bleeding from its wound. They were upset because they did not win the elections for the units of sanitation, diets and maintenance. They have harassed their co-workers and they have accused them of being stupid because they voted giving a vote of confidence to the Hospital Management. For how long do we have to put up with so much banditry? Why do they have to continue their campaign? Get on with your work and stop pestering us.

Last Wednesday almost all the Union delegates met in my office and Mr. Luis Alvarez, their President, requested on behalf of every one, that I should reduce the suspension of the suspended co-workers only to two (2) days and that, in addition, we let them charge the days lost to regular vacations. I requested one day to answer their petitions. I consulted with my pillow and I was going to agree with their petitions. However, the next day, on Thursday, first thing in in [sic] the morning they again distributed another leftlet [(sic)] challenging the Hospital. How good one can be short of becoming an as . . .? How it is possible that we should accept

a petition that is within out [sic] authority to grant? We have run out of checks to be slapped at.

To our unionized co-workers -- both those unionized by their own decision, as well as those that had no other choice -- I ask you: Do you agree that the Union should blemish the Hospital's image? I am sure that the majority will answer NO. Then, make your voice be heard; do not let that an immature person decide for all of you.

Rodriguez expressed regret, in his testimony on July 14, 1989, for having written this memorandum, but he blamed it on "all kinds of lies" the Union was spreading around, disparaging the hospital. However, the sentiments expressed in that memorandum show a deep and abiding dislike and distrust of the Union and its agents, particularly Milton Suarez, which is reflected in efforts made by HSR and CMT to avoid the transfer of Union obligations from HSR to CMT. In my own opinion, the memorandum more accurately reflects Rodriguez' real sentiments than his *mea culpa* at this hearing. There is no indication that he ever issued any apology or confession of error to the employees of HSR or of HIMA. Moreover, the memorandum is consistent with Cartagena's statements to Suarez when he fired him in 1983, and also with the words of Arelis Veintidos in a conversation with Suarez early in 1988 when she told Suarez that she wanted to make the new hospital "work as really a hospital should work." When he asked about labor problems she replied that she could not direct a hospital with a labor problem, but it was "like fashion, that matters pass but everything goes back to normal."

All of this demonstrates to me an attitude of antiunion animus on the part of the Respondents here, and a determination by management to eliminate the Union as a "problem" in its operation of HIMA. This last point is borne out, as I have found, by the

efforts made by Rodriguez, Pineiro, Cartegeno, Ortiz, and Veintidos to build a corporate wall between HSR and CMT, and to continue to argue this issue to the present time, despite the overwhelming weight of contrary evidence.

A part of any campaign to keep the Union out of the new hospital could well be the refusal to rehire union activists. If CMT had in mind to do this, there were problems, first with the pledge Rodriguez included in his August 30, 1985 memorandum to all employees, and, second, the settlement agreement of May 19, 1988, in which CMT committed to employ a minimum of 95 percent of the employees employed by HSR at the time that HIMA began its operation as a hospital. [W]hile we have no figures on the number of people employed by HSR in the two units involved here, in November 1988, I would estimate from the numbers who were actually hired by CMT, that there were about 100.[45] This is not enough on which to base a finding, but might hint at a reason why only five union delegates and officers were not hired at CMT.

Turning to Suarez' individual situation, he went to the HIMA construction site early in 1988, and had a conversation with Arelis Veintidos, described above. Suarez did not, however, make out and file an application for employment until October 27, when he accompanied Miguel Gonzalez to the now almost completed HIMA, where they met and conversed with Carlos Pineiro. While they were at the new hospital Suarez handed in an application for employment.

On November 14, Suarez returned to HIMA and talked with Ms. Veintidos. He asked if he was going to be hired, and she replied that she did not know. He returned on November 23 and

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[45] The various charges filed here range from 400 to 300 employees, but I think those figures reflect estimates of total employment, rather than employment in the relevant units.

was told by Veintidos that the hiring process was "slow."[46] She said she was willing to talk about his application, and his employment, but she did not mention any problems with his employment at HSR. Suarez heard no more from Veintidos, or anyone at HIMA, and was not hired.

Felix Ortiz testified that Suarez had a lengthy record of insubordination, absenteeism and suspensions from 1984 down to August of 1988. He did not mention the 1983 discharge, nor the August 30, 1985 memorandum from Rodriguez. However, the only document communicated from Ortiz' office at HSR to Veintidos at HIMA was a form entitled "Verification of Employment References" showing absences in 1987 of no days, and absences in 1988 of 9 days for illness and 6 days of vacation in the period January to August. The form showed a 20-day suspension in 1987 for "violations of administrative rules." Although there is no indication of any days of absence in 1987, the form states that there was an "absenteeism pattern on Mondays and Fridays during the year 1987." This document bears a symbol showing that it was approved by Ortiz, and was sent to HIMA.

Veintidos testified that she made the decision not to hire Suarez based upon "a consistent pattern" pointed out in the verification form, in the last 2 years, of absenteeism including employment and salary suspensions for violations of administrative rules. As she stated, "An employee or employee candidate with that employment reference is not the best candidate for employment."

Veintidos testified that she had never consulted with Ortiz about Suarez or any of the employees who had applied from HSR. I found Veintidos to be articulate and highly intelligent, and I am

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[46] By this time, as testified to by Carlos Pineiro, and noted previously, about 100 people had been hired in the two units concerned here, of whom 89 were former HSR employees. According to Pineiro this figure represented almost all of the former HSR employees who were hired for HIMA.

sure she will not be surprised that I do not believe that she did not contact Ortiz, or her old boss, Pineiro, or even Rodriguez, with respect to hiring of certain individuals. After all, she had worked for Pineiro in a responsible position at HSR. She must have known and worked closely with Ortiz in her years at HSR. She must have known of the perceived problems which Rodriguez and other managers of HSR had had with the Union, with Suarez ("Mr. knows it all") and with those who were close to Suarez in the leadership of the Union. She first denied that she had any knowledge about Suarez other than the verification form, then admitted that she had known Suarez, and about his union activities.

But, even if I do not specifically discredit Vientidos' testimony on this point, I find that she herself knew all these people and their opposition to management policies, their passing out of literature, their aborted attempt to persuade other employees to picket, and their other actions which would impede Veintidos, as a loyal agent of management, in her effort to make the new hospital work "as really as a hospital should work."

Thus, Veintidos was not limited to the rather sketchy "Verification" form transmitted by Ortiz. If she had been so limited she would not have seen much difference between a number of similar forms submitted by the General Counsel concerning employees who were hired by Veintidos, some of whom worked for HSR, and some from other employers. It is significant that when asked about one such applicant, whose verification form portrayed an appallingly poor work record, Veintidos admitted that she had not seen the verification form before the applicant was hired.

From an examination of these verification forms, it is clear that the forms themselves were not the sole criterion for hire. Some applicants had interviews with Veintidos, and were shown around the new hospital when it was open. Milton Suarez was not

accorded an interview and was not hired. Hildargis Rodriguez Colon, an employee in the medical and surgery department at HSR filed an application in October 1988 at HIMA, but was not given an interview. Her verification form showed attendance problems in 1987 and 1988, and an interview (warning) in September 1987 on account of "problems with patients." Rodriguez was notified by her supervisor on November 13 that she would be working at HIMA the next day. She started to work there and was still employed at HIMA as of July 19, 1989.

It seems to me that this whole hiring process as it applied to HSR employees was really only a sham. To require long-time employees of HSR to fill out a lengthy application, and submit to verification and interviews with a person they had worked with there at HSR was needless and useless. Ninety five percent were going to be hired anyway, so why could Veintidos not have gone over to HSR (or not left there in the first place), picked up the personnel folders of the 95 percent, then brought them all over with the employees when HIMA opened. The reason why that was not done was a continuing effort by the employer here to make everyone believe that there was not one employer here, but two.

Suarez' employment record was not good, but so were not a lot of others. Respondent has not advanced any compelling reason why Suarez, looking at his verification form, and comparing it with many others who were hired, was not hired himself. The answer is in his active and militant role with the Union and in the expressed resentment to that role by management. I find that the failure to hire Suarez by November 14, 1988, is a violation of Section 8(a)(1) and (3) of the Act. *Grede Foundries,* 211 NLRB 710 (1974).

B. *Isabel Arriaga*

Isabel Arriaga Garcia was employed by HSR on August 18, 1986, as a registered nurse. She was a union delegate, and was

one of the 21 people who signed a letter to Joaquin Rodriguez on April 13, 1987, asking for discussions on the move to CMT, and about Rodriguez' antiunion letter of August 30, 1985. Arriaga also participated in the abortive picket line in front of HSR in October 1988, where employees were frightened away by the sight of supervisors gathered in front of the hospital and watching the prospective pickets. There never was any actual picketing at that time, but the four union people who were there, Suarez, Arriaga, Carmen Merced, and Norma Flores, were not hired by HIMA when it opened a few weeks later.

Arriaga obtained an application for employment at HIMA from Milton Suarez. While she was filling it out she had some questions about some of the requested information, so she called Arelis Veintidos. Veintidos asked her where she got the application, and when Arriaga told her that she got it from the Union, Veintidos said that she couldn't receive that application because she, Veintidos, was the only one who could hand out applications. She instructed Arriaga to call her secretary and make an appointment so she could pick up a proper application.

So Arriaga made an appointment and went to the trailer on the HIMA job site,[47] Veintidos interviewed Arriaga at that time, and they had a general discussion about the job.

Arriaga never heard from Veintidos about her application. She finally called HIMA about 8:30 p.m. on the evening of November 13, when HSR was closing down, and Veintidos told her that her application was "under evaluation." Arriaga finished her shift and went home. She did not hear from HIMA about her application, or about the reason or reasons why she was not hired.

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[47] This was early in 1988, Arriaga's application is dated February 3 (or March 2, depending on which position the month it in where is says 2/3/88 on the form).

Arelis Veintidos testified that she rejected Arriaga's application for employment because of information contained in the Verification of Employment References form sent to her from Ortiz at HSR, without any inquiry or investigation from Ortiz, or anyone else at HSR, or from Arriaga herself. The form contain records of two disciplinary actions, one on June 7, 1988, and the other on June 14, 1988. The first action is described as being for "Attempt to alter patient's record," and the second, a 15 day suspension without pay, and a verbal admonishment for "altering patient's record incongruent entries in maintenance of patient's record." It is apparent even from the verification form, that these two instances are really one. Beyond that, as in Suarez' case, there is a failure to exercise elementary prudence and fairness to find out what the reason was for the discipline administered to Arriaga. Moreover, as in Suarez' situation, there are other applicants in the group of Verifications placed in evidence, with similar deficiencies but who were hired.

I find, as with Suarez, that the explanations advanced by the Respondents here are a pretext, and the real reason for the failure to hire Arriaga was her activity on behalf of the Union, particular in that abortive picketing situation in October 1988. I find, therefore, that Respondent has violated Section 8(a)(1) and (5) by refusing to hire Isabel Arriaga by November 14, 1988.

C. *Carmen Merced*

Carmen Merced Baez had worked at HSR since 1976. She started as an LPN and in 1981 received an Associates' degree in nursing and was reclassified as an RN. She worked as an RN in emergency, surgery, medicine, pediatrics and in the laboratory. In 1986, she was awarded a job in the initial testing section of the laboratory and held that job until the hospital closed.

Merced was active in the Union from the beginning of the organizational campaign in 1983 and 1984. She passed out union literature, collected union authorization cards, and organized

meetings at the homes of employees. In January 1984, Merced was the cosignatory, with Juan Garcia, of an open letter to employees urging that they vote for the Union. At the election Merced served as an observer for the Union, and afterwards she became a delegate for the surgery department at HSR, and a member of the Union's negotiating committee from 1986. In 1988 she participated in a march in May, and in the demonstration in October, when she, with Suarez, Flores and Arriaga gathered in the view of management representatives and attempted without success to organize picketing by employees.

Merced filed an application for employment at HIMA on October 21, 1988. She talked with Arelis Veintidos at the time she filed, and they had a discussion about rotating shifts. Merced insisted that she could not work on rotating shifts. Merced again visited HIMA on November 14 and was informed by Veintidos that her application was "still in the evaluation process."

A verification report was submitted by Ortiz to Veintidos on Merced. The report was undated, and reported a number of absences due to illness, personal problems and union leave, negotiations, illness of daughter, and annual leave. These instances all took place in 1987 and 1988 but no dates are given. There was an "incident and interview" on account of personal business during working hours, and a comment that "This employee is not loyal to the institution, since she reaches the point of telling patients that if it were up to her, she would not hospitalize herself in this Institution."

In addition to Merced's application form, a paper was introduced by Respondent CMT which, according to Veintidos, was attached to Merced's application. This was a note from Veintidos' secretary reporting a telephone message allegedly given by Merced to another secretary in which Merced said that she

wanted to work "only in the laboratory."[48] In her direct examination Veintidos stated that there was no position for a nurse in the laboratory and that was the reason Merced was not hired.[49] Later, on cross-examination, Veintidos stated that the decision was based "exclusively" on the verification form itself.

This shift in the reasons for the decision not to hire Merced gives rise to a proper inference that the real reason for failure to hire was Merced's union activity. *DeLorean Cadillac*, 218 NLRB 1362 (1975). I think it must be clear from an evaluation of the haphazard manner in which the verification forms were prepared; no dates on the documents; no dates for alleged deficiencies or offenses; no investigation by Veintidos of ambiguous or unintelligible allegations about employees; discrepancies between those who were hired, with poor attendance records, and these with poor attendance records who were not hired; the lumping together of permissible absences due to illness or vacation with improper absences or tardiness; that the evaluation process, and the hiring process itself, was a sham. The verification forms were poorly prepared, the screening of the forms was at best haphazard and spotty, sometimes not even examined before hiring decisions were made. In this kind of clutter, any decision could have been made about anyone. In view of Respondents' union animus, discussed above, decisions about union activist are bound to be tainted by the antiunion feelings and personal dislike shown by

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[48] I rejected a request by the General Counsel to call Aurora Diaz, the secretary who received the original message. I refused to reconsider that decision at the hearing, and in view of my decision here, I see no need to reconsider it now.

[49] Veintidos did not base her decision on Merced's reluctance to work rotating shifts. I note also that in this case, as well as that of Norma Flores, discussed below, Veintidos did not inform these applicants that there were no jobs in the positions they were seeking, nor did she offer them other opportunities in their profession as registered nurses, in which category there were many positions available.

management toward union activists. I find that the refusal to hire Merced was based on her union activities, and violated Section 8(a)(1) and (3) of the Act.

d. *Norma Flores*

Norma Flores Baez began working at HSR in May 1982 as a registered nurse. She was assigned as a floor nurse, then went to the emergency room then, in 1983 or 1984 she became an epidemiology nurse where she remained until HSR closed in November 1988.

Flores had participated on the Union's bargaining committee in 1984, and was a union delegate. She participated in a march and vigil in March 1988 on behalf of the Union, and she was one of the four union supporters at the aborted October 1988 picketing demonstration. Along with Suarez, Arriaga, and Merced, she was seen by the management officials who were watching as these four people tried to persuade others to join their demonstration in front of Hospital San Rafael. After this, Flores participated with Suarez, Merced, and Elia Diaz in distributing a union flyer outside HSR at the end of October. Flores' name, together with notice of a meeting at her house, was printed on this flyer.

At the beginning of September 1988, Flores' supervisor, Rosuara Rodriguez, told Flores and the other employees in her department that management was going to give priority in employment at HIMA to present employees of HSR, and told them to make appointments to see Arelis Veintidos at HIMA. Flores received an appointment and went to see Veintidos, who was still located in the Triangle Engineering trailer. Veintidos explained all the things the new hospital was going to have in new facilities, and asked Flores what position she was going to apply for. Flores replied that she was going to apply for the job of epidemiological nurse, just as she was at HSR. There was some further discussion about fringe benefits and an advanced course that Flores wanted to take, then Flores filled out the application and left.

After this, all the other employees in Flores' department were invited to visit HIMA to become familiar with the physical layout, but Flores was not invited. On November 3, before HSR was closed, Supervisor Rosuara Rodriguez asked Flores for the hospital's disease control manual, and all protocols for control departments. She explained to Flores that they needed this material for some areas at HIMA. However, by November 11 Flores addressed a memorandum to Rodriguez explaining that the manual had not been returned from HIMA.

Flores received a form letter dated November 7 from Ortiz advising her that HSR was closing as of November 13, thanking her for her dedication and loyalty, and wishing her success in all future endeavors. Flores heard no more from Veintidos concerning her application, nor any reasons why the application was rejected.

In March 1989 Flores noticed advertisements in the newspapers for registered nurses at HIMA. On March 2, she filled out a new application for registered nurse provision and filed it with Iris Rosario in the personnel office at HIMA. Flores called the next week and was told that the application was "in process of evaluation." She called again 2 weeks later and was told again that the application was "in process of evaluation." Flores made no further calls, and received no letter or acknowledgement from HIMA.

Arelis Veintidos testified that Flores was not hired in November 1988 because she had applied for a position as an epidemiological nurse, and that position did not exist at HIMA. Veintidos stated that the Department of Health and Human Services required that the position of Infection Control Coordinator be at a supervisory level, and involved many skills and functions which Flores did not possess.

Again I note that Veintidos made no explanation to Flores in their discussion in September about a position at the new hospital.

Veintidos knew, because she knew Flores and Flores had told her, what position Flores was in, and what position she was applying for. But Veintidos must also have known about the HHS requirements, and the table of organization of HIMA. Yet she said nothing and merely let Flores file the application and leave.

Nor did Veintidos ever talk to Flores about the verification form supplied by Ortiz, which, she used as the reason why she did not hire Flores on her second try for employment in March 1989. This form, also undated, shows that Flores had time off, none of which appears to be unauthorized, except for possibly an hour and three-quarters lateness, and two disciplinary actions for, first, a meeting held on account of Flores's having been outside of her working area on January 9, 1988, during working hours, and the second, a cryptic statement dated only "87" showing a meeting held, with no discipline imposed, on account of "fraudulent attitude."

This apparently was the reason advanced by Respondents for denying Flores a job in 1989. No one attempted to explain what a "fraudulent attitude" is. Veintidos said she did not check this verification, or, indeed any of the others, with anyone, certainly not Ortiz, the Author, or Flores, the subject.

Here, again, I find that the reasons advanced by Respondents are not logical, nor reasonable, nor based on anything but vague, unsubstantiated allegations, or translation of allowable absences into excessive absenteeism. I find as in the above cases, that the failure to hire Norma Flores in November 1988, and again in 1989, were based upon her union activities and are violations of Section 8(a)(1) and (3) of the Act.

E. *Delia Diaz*

Delia Diaz Gonzalez worked at HSR as a medical records technician from July 1982 until after the hospital closed in November 1988. Diaz was a member of the Union, she was the

alternate delegate for the medical records department at HSR, and she had participated in the negotiations in 1987, in the protest march and vigil in the spring of 1988 and had handed out Union buttons and literature during the negotiations in 1987 and 1988.

Diaz applied for a position at HIMA by an application dated October 13, 1988. She had had an interview with Veintidos earlier, in August or September, at which Veintidos told Diaz about the new hospital. After she had filled out the application Diaz called Veintidos about the end of October. She did not call back so Diaz called a second time. Again she left a message, but Veintidos did not return her calls.

About November 7 Diaz received one of the form letters telling her that the hospital was closing, thank you and goodbye. Diaz's supervisor, Elsa Maldonado told her that the letter was a mistake, and to disregard the letter. Maldonado told Diaz that she had talked to Cyril Ollivierre, vice president for finance and administrator at HIMA, and he had told her that the employees in medical records were to work until the work was finished, or they heard from HIMA. Diaz continued to work until she finished her analysis work. She then told Maldonado that she was going to look for a job. Maldonado told her to take 2 weeks vacation and then to come back if she wanted to come back.[50]

About the end of November Diaz returned and spoke to Maldonado. Diaz said that she told Maldonado that she had not heard anything from HIMA, and that if she was not offered a job there she could not stay at San Rafael. Maldonado told her that if she was in her place she would have done the same thing. Maldonado told Diaz she had heard nothing about her situation. Diaz then left.

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[50] The date of this conversation is uncertain. Diaz was not asked about the date, and Maldonado did not testify.

This conversation must have confused Maldonado, because she wrote a letter to Diaz dated November 30 in which she conveyed to Diaz her understanding from their conversations that Diaz was no longer interested in working at HSR. She went on to assure Diaz that as long as there was a job in that department Diaz could go on working in her present position. Maldonado asked Diaz to reply within the next 5 working days or she would "understand that you do not wish to continue working for Hospital San Rafael."

Diaz claimed in her testimony that she did not receive this letter until December 9, 9 days after it was written, and 2 days after the expiration of the 5 business day deadline contained in the letter. Diaz had no explanation of why she did not get the letter, but did say it was in her mailbox but she thought it was peculiar, because the stamp was not cancelled.

When she read the letter on December 9, Diaz went to the old hospital and found that the medical records department was closed. Diaz then called Maldonado at HIMA and explained that she had just received the letter, and that she was not refusing to work at HSR but she wanted to have some job security at the new hospital because HSR was closed. Maldonado could not give her any satisfaction so they talked for a while and then said goodbye. Diaz received nothing further from HIMA.

Now, at this point I must point out that the General Counsel is not claiming any violations of law in Diaz' case arising from anything which I have just described. It was not disputed that at least two other employees in the medical records department were transferred to HIMA in November 1988, but they had more seniority than Diaz. Another one or two employees in the department were not technicians, and thus in different job categories. What the General Counsel is claiming is that a person named Belen Guadelupe Diaz was hired in April 1989, who was not a prior employee of HSR, and another employee, Virginia

Lebron, also not a former HSR employee, was hired on June 12, 1989, and that Delia Diaz should have been hired before these two employees. Thus, the date of the alleged violation in the failure to hire Diaz was, according to the General Counsel, April 4, 1989.

I have some difficulty with this. The General Counsel's theory is not clear, either in the record or the brief. But on the facts as I see them, Diaz was treated well and fairly by Maldonado, her supervisor. That Maldonado wrote the letter of November 30. I have no doubt, even though she did not testify. There is no evidence of an ulterior purpose in delaying the delivery of the letter, and no logical reason why Respondent should have done it. Thus, I find that Diaz must have been negligent in some way, or the Postal Service failed in some way. This being so, then Respondent would be entitled to assume, hearing no reply within the time limit set in the letter, that Diaz was no longer interested in working for San Rafael.

This could explain why Veintidos could have logically assumed that Diaz was not working for San Rafael, and was not on a list of people either coming to HIMA or being laid off at HSR.

Thus, I find no violations of the law in the case of Delia Diaz.

6. After the injunction.

a. *The alleged refusal to bargain*

After Judge Cerezo's Decision and Order on August 8, 1989, the Union attempted to start up the bargaining process directed by the Order. On August 10, Luis Alvarez Colon wrote to Carlos Pineiro, executive vice president of HIMA requesting that the hospital recognize and bargain with the Union as the representative

of its employees in unit B.[51] Alvarez requested a meeting for Thursday, August 17 at the "Conciliation and Arbitration bureau" in Hato Rey.

Pineiro was on vacation, so Alvarez' letter was answered by Joaquin Rodriguez, president of HIMA, on August 18. Rodriguez pointed out that there was a 30-day appeal period from the judge's order, expressed the Hospital's intention to appeal, and to request therein a stay of the order, and indicated that if the stay was denied, they could begin any time after September 7 at a mutually convenient date, time and place. Apparently Rodriguez was in error as to his understanding of the legal status of Judge Cerezo's order, because on August 24 he wrote again to Alvarez recognizing the Union as the bargaining representative of the employees in the LPN and technicians unit (unit B) and asking the Union to send its proposals for a contact. Rodriguez said they would study the proposals and submit a counter proposal, then they could set a date to begin the negotiations.

Alvarez replied to this on August 28, asking for a meeting to set "rules" for the negotiations on September 5, 1989[52] at the Conciliation and Arbitration Bureau. On September 1, Arelis Veintidos answered this letter, insisting that the hospital must receive the Union's proposals, study them, prepare and send counterproposals before any meeting could be scheduled. On the same day[53] Alvarez wrote to Veintidos again requesting an initial

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[51] There was no formal disclaimer of interest or abandonment of the registered nurses covered by unit A, but it is clear from this, and from the General Counsel's brief, that unit A is no longer considered as represented by the Union. I will adjust my recommended remedy and order accordingly.

[52] The letter stated "August 5," but that was obviously a typographical error.

[53] Some of these letters were hand delivered so they could be answered on the same day.

meeting to discuss the rules. He suggested Monday, September 11 at 10 a.m. at the Conciliation and Arbitration office in Hato Rey.

On September 11, there was some dispute about who showed up for this meeting, and when. Veintidos wrote to Alvarez on September 11 stating that representatives of HIMA were at the Conciliation and Arbitration Bureau on that morning at 10:00 a.m., but they could not meet with Alvarez because he was in another meeting for another hospital at the time.

Alvarez claimed that he was at the Conciliation and Arbitration office, but was never notified that Veintidos and her Attorney Heber Lugo Rigau, were looking for him there. There was a lot of testimony about this contretemps and a copy of the building security log showing that Veintidos and Lugo did come in that morning, but I consider this to be just an accident, some secretary forgetting to deliver or relay a message, and I attach no significance to the incident.

At this point I can take official notice that around the middle of September Puerto Rico was struck by a tropical storm, Hurricane Hugo, a real hurricane this time, which, while mainly confined to the north east part of the Island, including the San Juan area, did disrupt activities throughout the Commonwealth for some days.

After the hurricane, the next communication in this matter was a letter from Alvarez to Veintidos dated September 26 in which the Union requested certain information necessary for the drafting of "a serious and responsible proposal for the negotiation of a agreement. The information requested was a list of all employees with names, salaries, positions and hiring dates, and a list of all fringe benefits. Another letter, written on the same date, concerned Milton Suarez' salary and his treatment by Veintidos. Alvarez delivered these two letters in person to Veintidos. They discussed the missing connection at the September 11 meeting, each, of course, blaming the other.

The parties finally got together on a meeting at the Conciliation and Arbitration Bureau on October 10 at 9 a.m.

The parties stipulated that at the October 10 meeting they negotiated some rules for the bargaining sessions. There was no testimony on further meetings between the parties before this hearing closed on May 21, 1990.

The refusal by Respondents to comply with Judge Cerezo's order between the time of the Union's demand for recognition, August 11, 1989, and Rodriguez' letter extending recognition on August 24 was unlawful. *See Maness v. Meyers*, 419 U.S. 449 (1975); *San Antonio Telephone v. A.T.T.*, 529 F.2d [sic] (5th Cir. 1976). The refusal by Respondents to meet until the Union submitted a full contract proposal, the Respondents had time to study the proposal, and then themselves prepared counterproposals, was an unlawful condition in violation of Section 8(a)(1) and (5) of the act, and the court's order. *Chemung Contracting Corp.*, 291 NLRB 773 (1988); *Fountain Lodge, Inc*, 269 NLRB 674 (1984).

I agree with the General Counsel that the totality of Respondents' actions in the August 10 - October 10 period displays an intent to delay negotiations just as their similar conduct in 1987 tended to stall and string out negotiations. Respondents have thus violated Section 8(a)(1) and (5) of the Act.

b. *The disciplining of Milton Suarez*

Milton Suarez testified on January 22, 1990, about his reinstatement and subsequent employment problems. His direct testimony was, somehow, not recorded at the hearing and does not appear in the transcript for that date. When they became aware of this the parties moved to reopen the hearing to recall Milton Suarez and receive the missing testimony. I granted their joint motion and the hearing was reopened on May 21, 1990, to

accomplish this. Suarez did testify at that time in the same manner as he had in his appearance on January 22.

In order, hopefully, to avoid confusion as to this testimony, the reader of the record is referred to Mr. Suarez's direct testimony on pages 2226 through 2264, then to cross-examination by Mr. Lugo Rigau, counsel for Respondents CMT, TMCLP and Joaquin Rodriguez beginning on page 1998 of the transcript, running through page 2028.

I would also note that there is no reference in the record to the receipt of General Counsel's Exhibits 203 through 213, which were introduced through Mr. Suarez. I, therefore, officially receive these numbered exhibits into evidence at this time, except for General Counsel's Exhibits 203(a) and (b) which was [sic] rejected and which appears [sic] in the rejected exhibit file.

The order of the district court directed the Respondents to "*Reinstate Milton Suarez to his former position immediately*, or if such position does not exist, to a substantially equivalent position in the unit of licensed practical nurses and technicians." (Emphasis added.)

After the order was issued Milton Suarez advised Arelis Veintidos that he was ready to start working in the X-Ray department beginning on the next Monday, August 14. This letter was answered by Joaquin Rodriguez under date of August 15, and informed Suarez that "As soon as the order issued by Honorable Judge Carmen Vargas De Cerezo is firm and final, we will accept you to start working as X-Ray technician *or in a substantially equivalent position, in the alternative that there is no X-Ray technician position available*" (emphasis in original).

As a result of sober second thoughts, or perhaps legal advice, this communication was followed on August 24 by a letter from Veintidos to Suarez asking him to come to a meeting with her on

August 29 or 31, or September 1 "to start expediting the procedures related with your hiring.[54]

Veintidos and Suarez met on August 31. According to Suarez, Veintidos said that in order to reinstate him she needed the documents "that she had requested from the rest of the employees to proceed with my appointment." Veintidos sent a confirmation letter on September 1 listing the documentation, as she put it, "required by law" in order to "proceed with your employment contract." These documents were a health certificate; good conduct certificate; birth certificate; current professional license; evidence of continued formal education, including CPR; identification with photograph; and Social Security card.

On September 5, Suarez took the documents to HIMA and gave them to Veintidos secretary, Loraido Rivero. She gave him a "document of appointment." Suarez read it over, and noticed that the salary was less than he had been earning at HSR, $5.15 per hour, as compared with $5.43. He also told Ms. Rivero that he could not sign a form saying that he agreed to follow the personnel manual and regulations, because he had not read nor seen the manual and regulations. Rivero referred him then to Veintidos who told him that that was the salary scale in the department, and that she did not have a personnel manual available at that time. Suarez then went to check with the Union, and returned on September 6 to sign the appointment. At the same time he wrote to Veintidos protesting the lower salary and the fact that he had not received the personnel regulations. Suarez returned to work, I infer, on or about September 6.

Whatever my views of this procedure to which Suarez was subjected, there is no allegation in the complaint that the hospital's

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[54] This and subsequent actions indicate that Veintidos did not understand that the judge's order called for "immediate reinstatement," not a leisurely process of hiring as if Suarez were a new employee.

conduct constituted an unfair labor practice, and it is certainly not my function to determine in this proceeding whether Judge Cerezo's order was properly complied with.

In any event, Suarez resumed his active role in union activities as soon as he returned to work. Even before he went back he participated in the distribution and handout of a flyer proclaiming the Union's "great victory" in the district court. Then, on September 28 he joined with a number of other employees in the X-Ray department to send a communication to Maria T. Dominguez, the hospital's auxiliary services manager, requesting a meeting with her to discuss staffing problems in the X-Ray department.

Suarez was distributing copies of this letter on October 3 in the X-Ray department when he was approached by Dr. Francisco Loubriel Mendez, the newly hired director of the department. Suarez testified that he was handing a copy of the letter to Luz Neida Lopez Rubet, a supervisor in the department, when Dr. Loubriel came up, asked to see a copy, read it, and said that it would bring more problems in the department. Loubriel then said that he wanted to talk about "something personal between you and I," but Suarez told him that he was on his break, that he had been told he had to carry out his union activities on his own time in nonworking areas, and that if Dr. Loubriel wanted to talk, they could talk after Suarez finished his break.

After returning from his break Suarez was talking to a co-worker, Jose Puello, when Loubriel came up and told Suarez that he had asked him to come to his office after the break. Loubriel and Suarez then went to the Doctor's office. Loubriel told Suarez that he was the boss and when he called Suarez to a meeting, he should leave what he was doing and come to the meeting immediately. Suarez said he meant no disrespect, but he could not leave patients to take care of other matters. Loubriel told him to do what he said and that was it. He told Suarez that he had came

as director of the department as an independent contractor with the entire responsibility for the department, and he did not care about the Union, or anybody's rights, or the problems Suarez might have with the administration. He, Loubriel "could do a lot of damage in the Department." He also said that he had been told that Suarez could "damage the rest" of the employees.

Suarez told Loubriel that he was not damaging (the department), because what he had done he did legally, whereas the hospital been found guilty of violating his rights, and they had been forced to reinstate him and to sit down and negotiate.

The meeting concluded with Loubriel and Suarez both expressing sorrow that they could not understand each other.

Dr. Loubriel's version of this encounter was much more concise, but the general outlines are very similar, Suarez was passing out literature. Loubriel asked him to meet. Suarez said he was on break. When he returned (Loubriel said it was 45 minutes) Loubriel had to go and get him to come to the meeting. There was some talk about the Union, but Loubriel denied ever boasting about being "the boss," and denied saying that he could do a lot of harm in the department.

I do not feel in this instance that the General Counsel has established a prima facie case for a violation of law. I think both Suarez and Loubriel spoke the truth, as they recalled it. I think that Suarez was passing out literature, and Loubriel wanted to talk to him, as a new director, to explain how he viewed his new responsibilities. I think that Suarez did not report to Loubriel, but, by his own admission, was talking to another employee, it could have been for 30 or more minutes, after the break was over. If Loubriel was annoyed about that and if he told Suarez that he should report promptly when told, I can understand that. Moreover, if Loubriel told Suarez that he could damage the operation, or the other employees if he did not follow orders, that is, likewise, understandable.

Suarez impressed me as truthful, as I have said, but forgetful and muddled on times and details. I cannot accept his uncorroborated version of these events, and I do not find a violation of Section 8(a) (1) and (3) in this incident.

A second incident occurred about October 4 in the hospital in connection with a meeting between the technicians in the X-Ray department and their supervisor, Luz Neida Lopez. During this meeting, according to Milton Suarez, Lopez told the employees that they should think about how they were going to rotate shifts, for 7 a.m. to 4 p.m., 8 a.m. to 5 p.m., or 9 a.m. to 6 p.m. Suarez said that the employees were not in agreement with rotating shifts, and that he wanted to discuss the question with the Union. Lopez replied that the Union had nothing to do with the X-Ray department, and that there was no agreement between the Union and the hospital.

Lopez testified here, and denied that she ever said to Suarez that there was no union at the hospital. She did say to Suarez and the other employees that HIMA was Union, but that there was no collective-bargaining agreement, at that time. It still remained to be negotiated.

Here again, I note the similarity in the testimony, but here I find Lopez to be a credible witness, and in the absence of any corroboration of Suarez' story, I do not find that the General Counsel has established a prima facie case, based upon a preponderance of the credible evidence, and I do not find a violation of Section 8(a) (1) and (3).

The third incident in the Complaint involving Milton Suarez alleges that he was issued a written warning on October 2, 1989.

Luz Neida Lopez testified that she had spoken to Suarez on several occasions after he returned to work in September 1989 about disappearing from the X-Ray department without notice. Suarez always said it would not happen again, but it did, so Lopez

spoke about the problem to Arelis Veintidos. Veintidos thereupon prepared a "Written Orientation Meeting" form, listing several violations of hospital rules.

In connection with this warning, there was a meeting between Veintidos, Lopez, and Suarez where the specifics of the violations were discussed. The substance of the meeting, according to Suarez, was merely a listing of the violations, Suarez allegedly abandoned his work area without permission, interrupted other employees, concerned himself with the "needs of the X-Ray Department" which were properly matters for supervision, and not for Suarez, and generally being involved in nonwork activities on working time. Suarez denied that he had ever been warned about these things, but I do not credit that denial. I do credit Lopez' account, and I find that the warning was warranted by Suarez' activities in leaving his work area and interrupting the work of others.[55]

I therefore find no violation of Section 8(a) (1) and (3) in this warning incident.

IV. The Remedy

Having found that the Respondents herein have engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom and that they take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Hospital San Rafael, Inc. and Centro Medico Del Turabo are alter egos and a single employer within the meaning of the Act, and that Hospital San Rafael failed and refused to bargain collectively and in good faith with the Union as the exclusive bargaining representative of its employees in units A and B, as described above between May 19 and November 14,

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[55] There is no tie-up of the warning about the needs of the department with the letter from employees to Dominguez dated September 28.

1988. I shall recommend that Hospital San Rafael post a notice to its former employees and others on the premises of its alter ego, Centro Medico del [sic] Turabo.

Since I have found that Centro Medico Del Turabo, the alter ego of Hospital San Rafael has, since on or about November 14, 1988, failed to recognize or bargain in good faith with the Union as the executive bargaining representative of its employees in unit B as described above; and has unilaterally determined wages, hours, and working conditions for its employees in unit B, without notice to or bargaining with the Union at its subsidiary, Hospital Interamericano de Mediciana Avanzada, I shall recommend that it immediately recognize the Union, and bargain collectively in good faith with the Union, and if agreement is reached, embody such agreement in a written contract; that it reimburse all of its employees in unit B for any differences in wages, hours, and other conditions of employment from those that they enjoyed as employees of Hospital San Rafael; and that said CMT offer to Milton Suarez, Carmen Merced, Isabel Arriaga, and Norma Flores, immediate and full reinstatement to their former or substantially equivalent positions, and make them whole for any losses they may have suffered on account of CMT's discrimination against them in accordance with the formulas set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987).

In this case, the violations I have found are of such a grievous and aggravated nature as to show a calculated disregard for the statutory rights of employees and have caused employees to be deprived of their rights since the summer of 1987. In such case, I believe that a broad remedial order is warranted. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

On the basis of the above findings of fact, and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Hospital San Rafael, Inc., a subsidiary of San Rafael Planning Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Centro Medico del Turabo, Inc., the general partner and principal owner of Turabo Medical Center Limited Partnership, d/b/a Hospital Interamericano de Medicina Avanzada, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Hospital San Rafael, Inc. and Centro Medico del Turabo, Inc. are alter egos and a single employer within the meaning of the Act.

4. Centro Medico del Turabo is also a successor employer to Hospital San Rafael within the meaning of the Act.

5. Caribe Hospital Affiliates, Inc. is a joint employer with CMT and its subsidiaries, TMCLP and HIMA.

6. Union Nacional de Trabajadores de la Salud, affiliated with National Union of Hospital and Health Care Employees, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

7. By failing and refusing to bargain collectively and in good faith with the Union from on or about July 29, 1987, to November 14, 1988, and by violating the terms of a settlement agreement entered into on May 19, 1988, Hospital San Rafael violated Section 8(a) (1) and (5) of the Act.

8. By refusing to recognize and bargain collectively with the Union in the bargaining units described below from November 14, 1988, to August 8, 1989, Centro Medico del Turabo as the alter ego to Hospital San Rafael, has violated Section 8(a) (1) and (5) of the Act.

9. By refusing to recognize and bargain collectively with the Union in the bargaining units described below, as the successor employer to Hospital San Rafael, Centro Medico del Turabo has violated Section 8(a) (1) and (5) of the Act.

10. By unilaterally and without notification to or consultation with the Union, changing wages, hours, and conditions of employment of employees in the units described below, Respondent Centro Medico del Turabo, as the alter ego of and as successor employer to Hospital San Rafael has violated Section 8(a) (1), (3), and (5) of the Act.

11. The Units appropriate for collective bargaining in this portion of the case are:

Unit A) Included: All registered nurses and pharmacists employed by Respondent at its hospital located in Caguas, Puerto Rico.

Excluded: All other employes, office clerical employees, guards and supervisors as defined in the Act

Unit B) Included: All licensed practical nurses and technicians employed by Respondent at its hospital located at Caguas, Puerto Rico, including escorts: EKG technicians; Respiratory Therapy technicians; X-Ray technicians; Operating Room Technicians; Dietary Technicians; Medical Records Technicians; Admission Clerks; Record Room Clerks; X-Ray Clerks; Diet Department Clerks; Respiratory Therapy Clerks; Pharmacy Clerks; Operating Room Clerks; Emergency Room Clerks; Ward Clerks; and Pharmacy Auxiliaries.

Excluded: All other employees, office clerical employes, professional personnel, guards and supervisors as defined in the Act.

12. By refusing to rehire, or to continue to employ Milton Suarez, Carmen Merced, Isabel Arriaga, and Norma Flores

Respondent Centro Medico del Turabo has violated Section 8() (1) and (3) of the Act.

13. By failing and refusing to bargain in good faith with the Union as the representative of its employees in unit B, described above, on and after August 8, 1989, and until October 20, 1989. Centro Medico del Turabo has violated Section 8(a) (1) and (5) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the I issue the following recommended[56]

ORDER

The Respondent, San Rafael Hospital, Inc., and Centro Medico del Turabo and, its subsidiaries, Turabo Medical Center Limit Partnership and Hospital Interamericano of Medicina Avanzada, their officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Withdrawing recognition of the Union as the exclusive representative of their employees in the appropriate units.

(b) Failing and refusing to recognize and bargain collectively with the Union as the exclusive bargaining representative of their employees in the appropriate units.

(c) Failing and refusing to abide by the collective-bargaining agreement between the parties.

(d) Unilaterally changing wages, hours and working conditions of its employees, in the Unit described below.

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[56] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Failing and refusing to employ or recall for employment Milton Suarez, Carmen Merced, Isabel Arriaga and Norma Flores.

(f) In any manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request bargain in good faith bargain with the Union concerning wages, hours and other terms and conditions of employment for the employees in the following appropriate unit:

Unit B) Included: All licensed practical nurses and technicians employed by Respondent at its hospital located at Caguas, Puerto Rico, including escorts: EKG technicians; Respiratory Therapy technicians; X-Ray technicians; Operating Room Technicians; Dietary Technicians; Medical Records Technicians; Admission Clerks; Record Room Clerks; X-Ray Clerks; Diet Department Clerks; Respiratory Therapy Clerks; Pharmacy Clerks; Operating Room Clerks; Emergency Room Clerks; Ward Clerks; and Pharmacy Auxiliaries.

Excluded: All other employees, office clerical employes, professional personnel, guards and supervisors as defined in the Act.

and is an agreement is reached, embody the terms of such agreement in a written, signed document.

(b) Make its employees in the above described unit whole for any losses they may have suffered because of any unilateral changes in wages, hours and working conditions.

(c) Offer to Milton Suarez, Carmen Merced, Isabel Arriaga and Norma Flores immediate and full reinstatement to their former jobs, and if those jobs no longer exist, to substantially equivalent

positions without prejudice to their seniority or any other right or privilege previously enjoyed, and make each of the whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the Section entitled "The Remedy," above.

(d) Remove from its files any references to the unlawful refusals to rehire, and notify each of these employees that this has been done, and that the refusals to rehire will not be used against them in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its place of business at Caguas, Puerto Rico, (in both the English and Spanish languages) copies of the attached notice marked "Appendix."[57] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[57] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

June 19, 1991

APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT withdraw recognition of Union Nacional de Trabajadores de la Salud, 1199, affiliated with National Union of Hospital and Health Care Employees, AFL-CIO, as the exclusive representative of our employees in units A and B described below.

WE WILL NOT fail and refuse to recognize and bargain collectively with the Union as the exclusive representative of our employees in units A and B.

WE WILL NOT fail and refuse to abide by the 1984-1987 collective-bargaining agreement applicable to our employees in units A and B.

WE WILL NOT unilaterally change the wages, hours, and working conditions of our unit employees without prior notice to the Union and without first affording the Union an opportunity to meet and bargain concerning such matters.

WE WILL NOT fail and refuse to employ or recall for employment or otherwise discriminate against employees who support the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union concerning the wages, hours, and other terms and conditions of employment for the employees in the following appropriate units and, if an agreement is reached, embody the terms of such agreement in a signed written document:

Unit A

Included: All registered nurses and pharmacists employed by the Respondents at their hospital located in Caguas, Puerto Rico.

Excluded: All other employees, office clerical employees, guards and supervisors as defined in the Act.

Unit B

Included: All licensed practical nurses and technicians employed by the Respondents at their hospital located at Caguas, Puerto Rico, including escorts; EKG technicians; Respiratory Therapy technicians; X-Ray technicians; Operating Room Technicians; Dietary Technicians; Medical Records Technicians; Admission Clerks; Record Room Clerks; X-Ray Clerks; Diet Department Clerks; Respiratory Therapy Clerks; Pharmacy Clerks; Operating Room Clerks; Emergency Room Clerks; Ward Clerks; and Pharmacy Auxiliaries.

Excluded: All other employees, office clerical employees, professional personnel, guards and supervisors as defined in the Act.

WE WILL maintain in full force and effect the 1984-1987 collective-bargaining agreement applicable to both units A and B; however, WE WILL adhere to any changes in wages, benefits, or other terms and conditions of employment for unit employees which were unilaterally instituted, but are superior to those set forth in the agreement, except on request by the Union.

WE WILL make unit employees whole for any losses that they may have suffered because of any unilateral changes in wages, hours, and working conditions or because of our failure to abide by the 1984-1987 collective-bargaining agreement with the Union.

WE WILL offer to Milton Suarez, Carmen Merced, Isabel Arriaga, Norma Flores, and Delia Diaz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other right or privilege previously enjoyed, and WE WILL make each of them whole for any loss of earnings that they may have suffered by reason of our discrimination against them, with interest.

WE WILL remove from our files any references to our unlawful refusals to rehire or employ Milton Suarez, Carmen Merced, Isabel Arriaga, Norma Flores, and Delia Diaz and notify each of them in writing that this has been done and that the refusals to rehire or employ will not be used against them in any way.

WE WILL NOT refuse to recognize and bargain with the Union as the exclusive representative of our employees in the appropriate unit with respect to wages, hours, working conditions, or other terms and conditions of employment of said employees, or refuse to honor the collective-bargaining agreement applicable to those

employees, or fail to apply to such employees the terms and conditions of said agreement.

HOSPITAL SAN RAFAEL, INC. CENTRO MEDICO DEL TURABO, INC. AND ITS SUBSIDIARIES, TURABO MEDICAL CENTER LIMITED PARTNERSHIP AND HOSPITAL INTERAMERICANO DE MEDICINA AVANZADA

(Employer)

Dated By

(Representative) (Title)

This is an official notice and must not be defaced by anyone. This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 150 Carlos E. Chardon Avenue, Room 591, Hato Rey, Puerto Rico 00919-1720, Telephone 809-766-5426.

APPENDIX A
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize;

To form, join, or assist any union;

To bargain collectively through representatives of their own choice;

To act together for other mutual aid or protection;

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with the Union as the exclusive representative of our employees in the appropriate unit with respect to wages, hours, working conditions, or other terms and conditions of employment of said employees, or refuse to honor the collective-bargaining agreement applicable to those employees, or fail to apply to such employees the terms and conditions of said agreement.

WE WILL NOT in any manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

HOSPITAL SAN RAFAEL, INC.

(Employer)

Dated: By

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Carlos E. Chardon Avenue, Room 591, Hato Rey, PR 00919-0000, Telephone No. 809-766-5347.

APPENDIX B
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize;

To form, join, or assist any union;

To bargain collectively through representatives of their own choice;

To act together for other mutual aid or protection;

To choose not to engage in any of these protected concerted activities.

WE WILL NOT withdraw recognition of the Union as the exclusive bargaining representative of our employees in the appropriate unit.

WE WILL NOT fail and refuse to recognize and bargain-collectively with the Union as the exclusive bargaining representative of our employees in the following appropriate unit:

B) Included: All licensed practical nurses and technicians employed by Respondent at its hospital located at Caguas, Puerto Rico, including escorts: EKG technicians; Respiratory Therapy technicians; X-Ray technicians; Operating Room Technicians; Dietary Technicians; Medical Records Technicians; Admission Clerks; Record Room Clerks; X-Ray Clerks; Diet Department Clerks; Respiratory Therapy Clerks; Pharmacy Clerks; Operating Room Clerks; Emergency Room Clerks; Ward Clerks; and Pharmacy Auxiliaries

Excluded: All other employees, office clerical employes, professional personnel, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally, and without notice to or bargaining with the Union, change our wages, hours and other conditions of employment.

WE WILL NOT refuse to employ or rehire employees because of their support for the Union.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the rights guaranteed them under Section 7 of the Act.

WE and our agent and joint employer, Caribe Hospital Affiliates, Inc. WILL, upon request, recognize and bargain collectively with the Union as the representative of our employees in the above described unit, and, if agreement is reached, embody the terms of said agreement in a written, signed document.

WE WILL offer immediate reinstatement to their former or substantially equivalent positions, to Milton Suarez, Carmen Merced, Isabel Arriaga and Norma Flores and we will make them whole for any discriminate against them by the payment of money plus interest thereon.

WE WILL expunge from our files any information relating to our discrimination against the above-named employees and WE WILL notify those employees in writing that such action has taken.

CMT, INC. TMCLP HIMA CHA, INC.

(EMPLOYER)

Dated: By

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered

with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Carlos E. Chardon Avenue, Room 591, Hato Rey, PR 00919-0000, Telephone No. 809-766-5347.

APPENDIX C

NOT INCLUDED
IN BOUND VOLUMES

Caguas, PR

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOSPITAL SAN RAFAEL, INC.; AND CENTRO MEDICO DEL TURABO, INC. AND JOAQUIN RODRIGUEZ d/b/a TURABO MEDICAL CENTER LIMITED PARTNERSHIP d/b/a HOSPITAL INTERAMERICANO DE MEDICINA AVANZADA

and

Cases 24-CA-5646
24-CA-5722
24-CA-5886

UNION NACIONAL DE TRABAJADORES DE LA SALUD, 1199, affiliated with NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, AFL-CIO

CENTRO MEDICO DEL TURABO, INC. AND JOAQUIN RODRIGUEZ d/b/a TURABO MEDICAL CENTER LIMITED PARTNERSHIP d/b/a HOSPITAL INTERAMERICANO DE MEDICINA AVANZADA; AND CARIBE HOSPITAL AFFILIATES, INC.

and

Cases 24-CA-5889
24-CA-5949
24-CA-6030

UNION NACIONAL DE TRABAJADORES

DE LA SALUD, 1199, affiliated with
NATIONAL UNION OF HOSPITAL AND HEALTH
CARE EMPLOYEES, AFL-CIO

ORDER GRANTING MOTION

On August 31, 1992, the National Labor Relations Board issued a Decision and Order in this proceeding.[1] The Board found, inter alia, that the Respondents violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith, withdrawing Union recognition, and implementing certain unilateral changes in wages, hours, and working conditions of unit employees. Relying on *McAllister Bros.*,[2] the Board ordered that the Respondents rescind the unilateral changes and also maintain in full force and effect the 1984-1987 collective-bargaining agreement with the Union, which contained an automatic renewal clause. Applying *Hickmott Foods*,[3] the Board further found it appropriate to issue a broad remedial order because of the serious nature of all the violations and the Respondents' egregious misconduct, demonstrating a general disregard for the employees' fundamental rights.

On September 28, 1992, the Respondents filed a Motion for Reconsideration and Clarification. They specifically challenge and request the deletion of the portions of the Board's remedy discussed above. In the alternative, they request that the Board clarify paragraph 2(b) of the Board's Order to conform with the language used in *McAllister Bros.*, that imposed certain conditions on the duration of the respondent employer's obligation to abide

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[1] 308 NLRB No. 86.

[2] 278 NLRB 601 (1986).

[3] 242 NLRB 1357 (1979).

by the expired contract. Thereafter, on October 15, 1992, the General Counsel filed a reply and opposition to the Respondents' motion.

The Board, having duly considered the matter, grants the Respondents' Motion for Reconsideration and Clarification only to the extent of clarifying the Board's Order in a manner consistent with *McAllister Bros.*, supra.

IT IS ORDERED that the Order be modified as follows:

Substitute the following for paragraph 2(b):

"(b) Maintain in full force and effect the 1984-1987 collective-bargaining agreement applicable to both Units A and B until the Respondents and the Union negotiate a new collective-bargaining agreement or the Respondents bargain in good faith to an impasse in accordance with the Act; however, adhere to any changes in wages, benefits, or other terms and conditions of employment for unit employees which were unilaterally instituted, but are superior to those set forth in the agreements, except on request by the Union."

IT IS FURTHER ORDERED that the attached Notice be substituted for the Board's original Notice.

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as clarified.

Dated, Washington, D.C., April 14, 1993.

By direction of the Board:

Joseph E. Moore

_____

Deputy Executive Secretary

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities

WE WILL NOT withdraw recognition of Union Nacional de Trabajadores de la Salud, 1199, affiliated with National Union of Hospital and Health Care Employees, AFL-CIO, as the exclusive representative of our employees in Units A and B described below.

WE WILL NOT fail and refuse to recognize and bargain collectively with the Union as the exclusive representative of our employees in Units A and B.

WE WILL NOT fail and refuse to abide by the 1984-1987 collective-bargaining agreement applicable to our employees in Units A and B.

WE WILL NOT unilaterally change the wages, hours, and working conditions of our unit employees without prior notice to the Union and without first affording the Union an opportunity to meet and bargain concerning such matters.

WE WILL NOT fail and refuse to employ or recall for employment or otherwise discriminate against employees who support the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union concerning the wages, hours, and other terms and conditions of employment for the employees in the following appropriate units and if an agreement is reached, embody the terms of such agreement in a signed written document.

Unit A

Included: All registered nurses and pharmacists employed by the Respondents at their hospital located in Caguas, Puerto Rico.
Excluded: All other employees, office clerical employees, guards and supervisors as defined in the Act.

Unit B

Included: All licensed practical nurses and technicians employed by the Respondents at their hospital located at Caguas, Puerto Rico, including escorts: EKG technicians; Respiratory Therapy technicians; X-Ray technicians; Operating Room Technicians; Dietary Technicians; Medical Records Technicians; Admissions Clerks, Record Room Clerks; X-Ray Clerks; Diet Department Clerks; Respiratory Therapy Clerks; Pharmacy Clerks; Operating Room Clerks; Emergency Room Clerks; Ward Clerks; and pharmacy Auxiliaries.
Excluded: All other employees, office clerical employees, professional personnel, guards and supervisors as defined in the Act.

WE WILL maintain in full force and effect the 1984-1987 collective-bargaining agreement applicable to both Units A and B until we and the Union negotiate a new agreement or we bargain in good faith to an impasse in accordance with the Act; however, WE WILL adhere to any changes in wages, benefits, or other terms and conditions of employment for unit employees which were unilaterally instituted, but are superior to those set forth in the agreement, except on request by the Union.

WE WILL make unit employees whole for any losses that they may have suffered because of any unilateral changes in wages, hours, and working conditions or because of our failure to abide by the 1984-1987 collective-bargaining agreement with the Union.

WE WILL offer to Milton Suarez, Carmen Merced, Isabel Arriaga, Norma Flores, and Delia Diaz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other right or privilege previously enjoyed, and WE WILL make each of them whole for any loss of earnings that they may have suffered by reason of our discrimination against them, with interest.

WE WILL remove from our files any references to our unlawful refusals to rehire or employ Milton Suarez, Carmen Merced, Isabel Arriaga, Norma Flores, and Delia Diaz and notify each of them in writing that this has been done and that the refusals to rehire or employ will not be used against them in any way.

HOSPITAL SAN RAFAEL, INC.; AND CENTRO MEDICO DEL TURABO, INC. AND JOAQUIN RODRIGUEZ d/b/a TURABO MEDICAL CENTER LIMITED PARTNERSHIP d/b/a HOSPITAL INTERAMERICANO DE MEDICINA AVANZADA

(Employer)

Dated: _____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Federal Building, 150 Carlos E. Chardon Avenue, Room 591, Hato Rey, Pueto Rico 00919-1720, Telephone 809-766-5426.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-2026

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SAN RAFAEL RIVERA HOSPITAL, INC., &
CENTRO MEDICO DEL TURABO, INC.
& ITS SUBSIDIARIES TURABO MEDICAL
CENTER LIMITED PARTNERSHIP AND
HOSPITAL INTERAMERICANO
DE MEDICINA AVANZADA,
Respondents.

BEFORE
Torruella, Chief Judge,
Selya, Cyr, Boudin & Stahl, Circuit Judges.

ORDER OF THE COURT

Entered: February 1, 1995

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion

for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active services and a majority of said judges not having voted to order that the appeal be heard of reheard by the court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By The Court

FRANCIS P. SCIGLIANO, Clerk

Messrs. Grant, Lugo-Rigau, Cornnell, Havard,
& Misses Murphy & Armstrong

Supreme Court, U.S.
FILED
JUL 3 1995

(2)

No. 94-1802

In the Supreme Court of the United States

OCTOBER TERM, 1995

HOSPITAL SAN RAFAEL, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, on the record in this case, the petitioner Centro Medico del Turabo, Inc., was correctly found to be the alter ego of petitioner Hospital San Rafael, Inc., regardless of whether Centro Medico was created for the purpose of evading Hospital San Rafael's labor law obligations.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1802

HOSPITAL SAN RAFAEL, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 42 F.3d 45. The decision and order of the National Labor Relations Board (Pet. App. 15a-35a), and the decision of the administrative law judge (Pet. App. 36a-125a), are reported at 308 N.L.R.B. 605. The Board's order amending its decision and order (Pet. App. 126a-132a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1994. A petition for rehearing was denied on February 1, 1995. Pet. App. 133a-134a.

The petition for a writ of certiorari was filed on May 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Hospital San Rafael, Inc. (HSR) was established in 1933 as a neighborhood hospital in Caguas, Puerto Rico. In 1978, doctors Jaime Soler and Jose Badillo purchased about 80 percent of HSR's stock, and hired Joaquin Rodriguez as its president. Pet. App. 2a, 54a. Soler, Badillo, and Rodriguez comprised HSR's board of directors. HSR was in poor financial condition, and in mid-1978, local health authorities informed HSR that, unless problems in the hospital's physical plant were remedied, HSR would lose its eligibility to treat Medicare patients. *Id.* at 2a. Because remedying the deficiencies in the hospital's physical plant would have required substantial demolition and reconstruction, Soler, Badillo, and Rodriguez decided instead to build a new hospital. *Id.* at 2a, 59a. In August 1978, petitioner Centro Medico del Turabo, Inc. (CMT) was created to operate the proposed new facility, Hospital Interamericano de Medicina Avanzada (HIMA),[1] because HSR itself was unable to secure necessary bank loans, and because HIMA was expected to serve a larger geographical area. *Id.* at 2a-3a, 60a. Soler owned 40 percent of CMT, and

[1] Petitioner Turabo Medical Center Limited Partnership (TMCLP) was established in 1980 to act as CMT's operating arm in the planning, financing, and construction of HIMA. Pet. App. 16a. TMCLP and HIMA are subsidiaries of CMT (*id.* at 66a), and, as petitioners note (Pet. 5 n.2), there is no legally relevant distinction among them for purposes of this case.

Badillo and Rodriguez each owned 20 percent. Rodriguez served as CMT's president, and Soler and Badillo were on the board of directors. *Id.* at 3a, 56a.

In January 1984, the Union [2] became the certified collective bargaining representative of HSR's professional and technical employees. HSR and the Union then negotiated a labor contract, effective from September 1, 1984, through August 31, 1987; the agreement explicitly provided that it would remain in effect until a new contract replaced it. Pet. App. 3a, 17a. In 1985, the chief union steward began to question HSR about the effect the planned new hospital, HIMA, would have upon job security. On August 30, 1985, Rodriguez issued a memorandum to HSR's employees, stating "on behalf of [HSR] and [CMT]" that the employees would be "transferred" to HIMA with the same salary and benefits. *Id.* at 4a.

In May 1987, the Union sought to begin negotiations for a new labor agreement to succeed the contract due to expire on August 31, 1987. The Union's proposals included a provision naming both HSR and CMT as parties to the contract. Pet. App. 4a, 76a. HSR responded that it regarded the Union's certification as covering HSR employees only, that HSR would not negotiate on behalf of CMT, and that HSR would not negotiate at all if the Union continued to seek CMT's inclusion in the new agreement. *Id.* at 76a.

An unfair labor practice charge was filed by the Union. The General Counsel of the National Labor Relations Board (Board) issued a complaint alleging

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[2] Local 1199, Union Nacional de Trabajadores de la Salud, a/w National Union of Hospital and Health Care Employees, AFL-CIO.

that HSR and CMT were a single employer and alter egos, and that they had unlawfully refused to bargain with the Union. Pet. App. 4a. In May 1988, the Union reached separate settlement agreements with HSR and CMT. HSR agreed to negotiate in good faith with the Union; CMT agreed to retain 95 percent of HSR's employees when HIMA began operations, but CMT stipulated that it was not thereby agreeing to recognize the Union. *Id.* at 4a, 48a. In light of the settlements, the General Counsel withdrew the complaint, but reserved the right to reinstate it in the event of non-compliance. *Id.* at 49a.

HSR and the Union resumed negotiations for a new contract, but discussions broke down in September 1988 on the issue of the inclusion of CMT as a party. Pet. App. 49a. In October 1988, the Union filed a petition with the Board seeking to have the settlement agreements set aside and the complaint reinstated. *Id.* at 4a. HSR closed on November 14, 1988, and HIMA opened for business on November 19. *Id.* at 43a, 82a.

2. In December 1988, the Union filed unfair labor practice charges alleging that, since the date of the settlement agreements, HSR and CMT had failed to bargain in good faith and had unlawfully refused to hire five union activists at HIMA. Pet. App. 5a, 39a. In February 1989, the General Counsel issued a new complaint against HSR and CMT.[3]

a. After a hearing, an administrative law judge (ALJ) found that CMT was the alter ego of HSR. Pet. App. 5a, 70a. The ALJ explained that "[t]he

[3] The General Counsel also filed a petition in federal district court pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), seeking, among other things,

Board has generally found alter ego status where the two enterprises involved are found to have substantially identical management, business purposes, operations, equipment, customers, and supervision, as well as ownership." *Id.* at 67a. The ALJ added that "[a] further, and critical, consideration to the finding of alter ego status, is whether the new company was created 'to evade responsibilities under the Act.'" *Id.* at 68a (citing *Fugazy Continental Corp.*, 265 N.L.R.B. 1301 (1982)).

As to common ownership, the ALJ found that doctors Soler and Badillo, who owned 87 percent of the stock of HSR, owned about 60 percent of the stock of CMT. Pet. App. 68a. As to common management, the ALJ found that "[s]ince 1978 Joaquin Rodriguez has exercised executive control over both HSR and CMT." *Ibid.* The ALJ observed that Rodriguez was responsible for the creation of CMT in 1978; that he served as president and chief executive officer of both entities at all relevant times; and that "all policy is determined by him, or by him with his managers." *Id.* at 68a-69a. The ALJ further found that (1) at the "top" level of management, in addition to Rodriguez (president and CEO of both entities), Carlos Pineiro, the executive vice-president of HSR, became executive vice-president of CMT; (2) the

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an injunction requiring CMT, as a legal successor to HSR, to recognize and bargain with the Union. On August 8, 1989, the district court issued a preliminary injunction, and the court of appeals affirmed. Pet. App. 5a; see *Asseo* v. *Centro Medico del Turabo, Inc.*, 900 F.2d 445 (1st Cir. 1990). On December 15, 1989, the General Counsel issued a further complaint alleging that, despite the injunction, CMT had continued to refuse to bargain with the Union for a period of about two months. Pet. App. 42a.

managers at "[t]he next level of management" at HSR assumed similar positions at CMT; and (3) at the "lower level" of management, roughly 85 of 102 supervisors and department heads at HSR moved to the new hospital. *Id.* at 64a-65a, 69a.

The ALJ further found that HSR and CMT shared "a common business purpose and customer base." Pet. App. 69a. The ALJ noted that both hospitals were located in the same city and the new hospital was "built and designed to serve the same, maybe a somewhat larger[,] area." *Ibid.* "The type of service and the area in which it is performed remain basically the same" at CMT, the ALJ explained; that the new hospital "is larger, more elaborate, more modern and better equipped," he observed, "makes a difference in degree, but not in kind, of the services offered." *Id.* at 69a & n.28.

The ALJ also found it significant that "Rodriguez, Soler and Badillo, among themselves, as directors of both [HSR and CMT], viewed HSR and CMT as a single entity for purposes of internal dealings." Pet. App. 62a. For example, the ALJ found that, in February 1982, HSR's board of directors passed a resolution that stated that HSR was "taking all steps regarding the construction of new facilities which would be the [CMT] project." *Ibid.* The resolution warned that any physician practicing at HSR who promoted a competing group's plan to build a new hospital would be deemed to be engaged in activity "harmful to the best interests of [HSR]," which could result in the loss of hospital privileges at HSR. *Ibid.* The ALJ observed that, between 1982 and 1987, HSR's annual financial statements characterized CMT as a "related party" of HSR. *Ibid.* Moreover, CMT owed HSR large sums of money through-

out that period and thereafter, on which neither interest nor principal was ever paid. *Id.* at 62a-63a. The ALJ found that, as of March 30, 1989, CMT owed HSR a total of more than $41 million, including $1 million which CMT had agreed to pay HSR for its operating license, but that "there is no evidence that any money was actually paid." *Id.* at 63a.[4]

Despite all of the foregoing evidence, the ALJ found that "CMT continuously and adamantly refused to admit its relationship with HSR to the Union." Pet. App. 69a. In the ALJ's view, "[HSR and CMT] knew, or reasonably should have known what the legal effect of that relationship was and is." *Id.* at 70a. "To continue to insist that these two corporations are, in effect, strangers to each other," the ALJ stated, "leads me to the conclusion that the new company, even though it may have been created initially in order to avoid the credit problems encumbering HSR, became a device to evade responsi-

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[4] The ALJ also found it significant that "[w]hen communicating with a local bank an impression was given that HSR and the new hospital projects were part of the same enterprise." Pet. App. 63a. For example, in an August 1981 letter to the Banco de Ponce, Rodriguez stated that "[HSR] is going through a major expansion of its facilities. It will become [CMT] and it will be housed in a most modern and sophisticated medical facility to be constructed in Caguas." *Id.* at 64a. Similarly, in February 1982, Rodriguez, in a letter to the same bank, described a plan to "[t]ransfer [HSR's] physical asset[s] to a corporation which is able to develop it when the Hospital is transferred to [CMT]." *Ibid.* (emphasis omitted). The ALJ also noted that, in 1983 and 1984, articles written by Rodriguez appeared in HSR's employee newsletter that "[spoke] of the new hospital in terms of 'we' or ['] us[']" and identif[ied] the new construction with the existing structure and its employees." *Id.* at 63a.

bilities under the [National Labor Relations] Act." *Ibid.* (footnote and internal quotation marks omitted).

b. The ALJ also found that HSR and CMT constituted a "single employer" for purposes of the Act. Pet. App. 70a. The ALJ explained that "[t]he question in the 'single employer' situation is whether the two nominally independent enterprises, in reality, constitute only one integrated enterprise." *Id.* at 67a (citation omitted). In addition to commonality of ownership and management between HSR and CMT (see pp. 5-6, *supra*), the ALJ found that responsibility for establishing labor-relations policy at both entities was vested in executive vice-president Pineiro. *Id.* at 66a. The ALJ also pointed out that, while "[t]he operations of the two hospitals were not interrelated in the sense that they functioned as a team," CMT "purchase[d] equipment from HSR, and * * * equipment was transferred to [CMT] along with management, administrators, professional, technical and nonprofessional employees * * * on account of the discontinuance of operations by [HSR], and assumption of operations by [CMT]." *Id.* at 69a. In that regard, the ALJ noted that "the fact that these two companies were not actual employers at the same time does not affect the conclusion that they are a single employer." *Id.* at 70a n.31.[5]

c. In light of the ALJ's alter ego and single employer findings, the ALJ concluded that the May 1988 settlement agreement between the Union and HSR had to be set aside. Pet. App. 53a. The ALJ

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[5] The ALJ also found that CMT was a legal successor to HSR, and therefore was obligated to recognize and bargain with the Union at the new hospital. Pet. App. 71a-73a. The Board, however, did not reach that issue. *Id.* at 18a-19a.

explained that, because HSR and CMT "knew, or should have known[,] that they constituted a single employer and alter egos within the meaning of the Act[,] * * * [i]t follows that an agreement by HSR to bargain in good faith with the Union would necessarily include a commitment to bargain on behalf of CMT on the question of the preamble, i.e., who was to be named as an employer in the negotiations, and about the coverage and the term of the collective-bargaining agreement under consideration." *Id.* at 52a-53a. The ALJ concluded that, "by refusing * * * to bargain further because of the Union's insistence on the inclusion of CMT as a Party Employer, HSR has shown that it never had any intention of bargaining in good faith on that issue or of complying with that provision of the settlement agreement." *Id.* at 53a.[6]

3. The Board affirmed the ALJ's findings that HSR and CMT constituted a single employer and were alter egos. Pet. App. 18a. In sustaining the ALJ's single employer finding, the Board disagreed with the ALJ's conclusion that HSR and CMT were not "actual employers at the same time." *Id.* at 8a n.2. Rather, the Board observed that "[i]n mid-1988, CMT began its hiring process for HIMA employees

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[6] The ALJ also found that CMT violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by refusing to rehire four HSR employees at the new hospital because of their union activities. Pet. App. 84a-102a, 114a-115a. The Board agreed with the ALJ's findings as to those four employees and found, in addition, that CMT had unlawfully denied a fifth HSR employee employment at the new hospital. *Id.* at 21a-26a. The court of appeals sustained those findings as supported by "ample evidence" (*id.* at 13a), and petitioners do not challenge that aspect of the court's decision (Pet. 12 n.8).

by distributing job applications and by interviewing and screening prospective applicants." *Ibid.* Therefore, the Board concluded, "CMT was in existence and operating over a significant period of time before HSR officially closed for business on November 14, 1988." *Ibid.*

Like the ALJ, the Board (with one member dissenting) determined that setting aside the settlement agreement between HSR and the Union was warranted in light of the alter ego and single employer findings. Pet. App. 18a. The Board concluded, *inter alia*, that HSR and CMT violated Section 8(a)(1), (3), and (5) of the Act, 29 U.S.C. 158(1), (3), and (5), by unilaterally changing the employees' terms and conditions of employment at the new hospital without bargaining with the Union. Pet. App. 27a. Accordingly, the Board ordered petitioners to honor the terms of the 1984 labor agreement pending the negotiation of a new contract, or until the parties reach a valid impasse in bargaining for a new contract. *Id.* at 128a.

4. The court of appeals enforced the Board's order. Pet. App. 1a-14a.

a. The court explained that, in analyzing whether one employer is an alter ego of another, "[m]otive matters * * * because a corporate transfer or transformation for the *purpose* of avoiding labor law obligations is an unsympathetic case for respecting the formal alteration, and faced with a subterfuge * * * the courts reasonably need give less weight to the other 'identity' criteria." Pet. App. 8a-9a. However, the court rejected the contention that such an improper motive is always required for a finding of alter ego status. *Id.* at 9a-10a. The court explained

that, "if a company merely changed its corporate form for legitimate tax or corporate reasons, it is hard to see why the new entity should be able to disregard an existing collective bargaining agreement." *Ibid.*

On the facts of this case, the court upheld the Board's alter ego finding as being "within reasonable limits," for "a substantial * * * identity exists between the two hospitals along every axis: ownership, senior management, supervisory management, employee base, geographic location and basic business function." Pet. App. 11a. Although "the decision of [HSR's] owners to establish a new hospital occurred for financial and operational reasons that have nothing to do with labor relations," *id.* at 9a,[7] that fact was not controlling under the court of appeals' analysis.

The court of appeals disagreed with the Board's single employer finding, stating that "[t]he single employer doctrine * * * seems to have little application to this case—which does not involve two ongoing businesses coordinated by a common master." Pet. App. 7a-8a. But "[i]n all events," the court concluded, "the Board's order here in dispute can be sustained on the alter ego theory." *Id.* at 7a.

b. Although the court sustained the Board's alter ego finding, it found "unpersuasive" the Board's

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[7] In the court's view, "[t]he Board's claim that [CMT's] 'purpose' was not improper at the outset but became improper simply because [CMT] declined to bargain makes little sense in the context of the alter ego doctrine," for "*if* the two companies were not alter egos, [CMT's] desire to resist obligations or liabilities of [HSR] would be understandable." Pet. App. 9a.

decision to set aside the May 1988 settlement agreement between HSR and the Union and found, further, that "no other evidence shows that the agreement was entered into in bad faith." Pet. App. 12a. However, the court observed that "there is no showing by the hospitals that the setting aside of the settlement agreement had any effect on the Board's other determinations or on any of the provisions of its remedial order." *Ibid.* Accordingly, the court enforced the Board's order "as written." *Id.* at 14a.

ARGUMENT

In a case on remand from a decision of another circuit, the Board is currently considering the nature of the alter ego doctrine and its relation to the single employer doctrine. Further review of the question petitioners present would therefore not be warranted at this time. In any event, the decision of the court of appeals is correct, and there is no conflict of decisions among the circuits requiring resolution by this Court. Accordingly, the petition should be denied.

1. The basic issue in this case is whether the Board was warranted in treating HSR and CMT as one entity. Since the only collective bargaining agreement is between the Union and HSR, CMT is required to respect that agreement only if it is an extension of HSR. There are two different, but related, labor law doctrines under which two nominally distinct entities may be found to be one—the "alter ego" and the "single employer" doctrines.

As this Court has explained, an alter ego relationship exists between two nominally different employers where there has been "a mere technical

change in the structure and identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management." *Howard Johnson Co.* v. *Detroit Local Joint Executive Board*, 417 U.S. 249, 259 n.5 (1974). In those circumstances, one employer may be treated, for purposes of the Act, as a "disguised continuance" of the other. *Ibid.* (quoting *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100, 106 (1942)). Consistent with the Court's teaching that an intent to evade legal obligations is "frequently" (but not necessarily) a feature of the alter ego relationship, the Board has explained that, to determine whether one nominally different employer is the alter ego of another employer:

> [W]e must consider a number of factors, no one of which, taken alone, is the *sine qua non* of *alter ego* status. Among these factors are: common management and ownership; common business purpose, nature of operations, and supervision; common premises and equipment; common customers, i.e., whether the employers constitute "the same business in the same market"; as well as the nature and extent of the negotiations and formalities surrounding the transaction. We must also consider whether the purpose behind the creation of the alleged *alter ego* was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.

Fugazy Continental Corp., 265 N.L.R.B. 1301, 1301-1302 (1982) (footnotes omitted), enforced, 725 F.2d 1416 (D.C. Cir. 1984). The Board, with court approval, has found the existence of alter ego relation-

ships in the absence of an intent to evade labor law obligations.[8]

Under the "single employer" doctrine, which "has its primary office in the case of two ongoing businesses" that constitute an integrated operation, "[m]ost of the alter ego criteria remain relevant but motive is normally considered irrelevant." Pet. App. 7a. Under that doctrine, two businesses, though nominally distinct, are treated as a unitary enterprise for purposes of the Act where there is interrelation of operations, common management, centralized control of labor relations, and common ownership. *Radio Union* v. *Broadcast Service*, 380 U.S. 255, 256 (1965). If the respective workforces of a unionized firm and a nonunion firm, when merged, would constitute an appropriate bargaining unit, then the unionized firm's labor contract applies, by operation of law, to the nonunion firm. See *South Prairie Construction Co.* v. *Local 627, Operating Engineers*, 425 U.S. 800 (1976); *C.E.K. Industrial Mechanical Contractors, Inc.* v. *NLRB*, 921 F.2d 350, 353-354 (1st Cir. 1990); *NLRB* v. *Lantz*, 607 F.2d 290, 295-298 (9th Cir. 1979).

As the court of appeals noted (Pet. App. 7a), the line of demarcation between the alter ego and single

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[8] See *Johnstown Corp.*, 313 N.L.R.B. 170, 171 (1993), enforced *sub nom. Stardyne, Inc.* v. *NLRB*, 41 F.3d 141 (3d Cir. 1994); *Tricor Products, Inc.*, 239 N.L.R.B. 65, 69 (1978), enforced, 636 F.2d 266 (10th Cir. 1980); *Campbell-Harris Electric, Inc.*, 263 N.L.R.B. 1143, 1148-1149, enforced, 719 F.2d 292 (8th Cir. 1983); *E.G. Sprinkler Corp.*, 268 N.L.R.B. 1241, 1243-1244, aff'd *sub nom. Goodman Piping Products, Inc.* v. *NLRB*, 741 F.2d 10 (2d Cir. 1984); *Leslie Oldsmobile, Inc.*, 276 N.L.R.B. 1314, 1315-1317 (1985).

employer doctrines is not neatly drawn in the decisions of the Board and of the courts. That lack of clarity is exemplified in *Stardyne, Inc.* v. *NLRB*, 41 F.3d 141 (3d Cir. 1994). There, the ALJ found that the entities involved did not constitute a single employer, but that they were alter egos; the Board, without disturbing the ALJ's finding as to lack of single employer status, affirmed the alter ego finding. See *Johnstown Corp.*, 313 N.L.R.B. 170 (1993). On review, the Third Circuit sustained the Board's position that unlawful intent is not a necessary prerequisite of alter ego status and, further, affirmed the Board's alter ego finding as supported by substantial evidence. *Stardyne*, 41 F.3d at 146-152. Nevertheless, the court remanded the case to the Board for further proceedings. *Id.* at 154. The court pointed out that, in *Gartner-Harf Co.*, 308 N.L.R.B. 531, 533 n.8 (1992), the Board had indicated that the alter ego doctrine "is in effect a subset of the single employer concept"; however, if that were true, the court observed, then the entities in *Stardyne* could not be alter egos, since the ALJ found they were not a single employer. 41 F.3d at 153. Although the court was "unsure why the alter ego [doctrine] should be regarded as a subset of the single employer doctrine" (*id.* at 152), it remanded the proceeding to the Board "so that it can reconcile the contradictory case law that it has developed" (*id.* at 153). The Board has accepted the court's remand, and the matter is currently pending before the Board.

Given the present lack of clarity in Board law as to the relationship between the alter ego and single employer doctrines, and in light of the fact that the proper contours of the alter ego doctrine

can be better understood in the context of its relationship to the single employer doctrine, we believe (contrary to petitioners, see Pet. 12 n.9) that the Court would be materially assisted, in considering whether unlawful intent is required for an alter ego finding, if it had the benefit of the Board's views on the questions raised by the court of appeals' remand in *Stardyne*. Accordingly, we submit that the issue that petitioners seek to present is not ripe for review by this Court.

2. The Board's position that unlawful intent is not a prerequisite for an alter ego finding is a reasonable interpretation of the Act, and thus should be sustained by the courts. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990). As the court below explained (Pet. App. 6a), although the "easiest" case for treating two nominally different employers "interchangeably" under the Act may be where one employer was created by the other to evade its obligations under the labor laws, that is not the only case in which the doctrine applies. Even "if a company merely changed its corporate form for legitimate tax or corporate reasons, it is hard to see why the new entity should be able to disregard an existing collective bargaining agreement." *Id.* at 9a. The absence of an unlawful motive is not dispositive of the alter ego determination. See *id.* at 10a-11a.

The Third Circuit likewise has upheld the Board's position, that intent to evade legal obligations is not a necessary prerequisite for alter ego status, as "consistent with the purposes and policies of the Act." *Stardyne*, 41 F.3d at 148. As the court noted, "the Board's policy, which relies primarily on an examination of objective criteria, provides for easier

and more consistent application of the Act than one in which intent is an essential element," while it still permits "changes in ownership of employers without saddling the successor with collective bargaining agreements to which they did not agree." *Ibid.* (citing *NLRB* v. *Burns International Security Services*, 406 U.S. 272 (1972)). "In this way," the court concluded, "the Board's rule can be said to promote the Act's goal of encouraging the use of collective bargaining arrangements as a way to balance economic bargaining power." [9] *Ibid.*

Petitioners argue (Pet. 24) that, unless an intent to evade legal obligations is required, a company that is a mere successor employer under *NLRB* v. *Burns International Security Services*, *supra*, will be

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[9] Other courts of appeals have similarly rejected the contention that a finding of improper subjective motive is a necessary prerequisite for alter ego status. See *NLRB* v. *Allcoast Transfer, Inc.*, 780 F.2d 576, 582 (6th Cir. 1986) ("If we were to require a finding of employer intent, an employer who desired to avoid union obligations might be tempted to circumvent the [alter ego] doctrine by altering the corporation's structure based on some legitimate business reason, retaining essentially the same business"); *NLRB* v. *Tricor Products, Inc.*, 636 F.2d 266, 269-270 (10th Cir. 1980) ("Whether a second employer is the *alter ego* of an earlier employer, or merely a successor employer, requires a consideration of numerous factors and often presents a close question"; "[t]here is no hard-and-fast rule"); *Goodman Piping Products, Inc.* v. *NLRB*, 741 F.2d 10, 12 (2d Cir. 1984) ("[T]he argument that the Board must find anti-union animus or an intent to evade union obligations before it can impose alter ego status is unpersuasive."). See also *Fugazy Continental Corp.* v. *NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984); *Carpenters Local 1846* v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489, 508 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983).

deemed to be the alter ego of the predecessor employer and, accordingly, will lose the freedom of a *Burns* successor to reject the substantive terms of the predecessor's labor contract. It is not necessary, however, to adopt an unlawful motivation rule in order to distinguish successor employers from alter egos. The essential distinction between a successorship and an alter ego relationship is that, in a successorship, a new employer takes over another employer's operations pursuant to a business transaction. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 43 (1987); *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 184 (1973); *Burns*, 406 U.S. at 281. In an alter ego situation, the entity that exists both before and after the business transaction "is in reality the same employer." *Howard Johnson Co.*, 417 U.S. at 259 n.5. The Board's analysis of whether a second entity is a "new employer," or rather "in reality the same employer," calls for an objective evaluation. Although the presence of subjective motivation to evade the labor laws is an aid to that objective analysis, it is not essential to it.

Indeed, petitioners do not dispute that, under the "single employer" doctrine, two businesses may be treated as a unitary enterprise and the labor contract of one may be applied to the other. There is no valid reason for requiring a finding of subjective bad faith in order to hold the second business to the first's bargaining and labor contract obligations just because the latter has discontinued operations for economic reasons where, as here, there was "substantial * * * identity * * * between the two * * * along every axis" of the objective factors relevant to an alter ego determination. Pet. App. 11a.

3. Petitioners' principal contention (Pet. 16-17) is that the court of appeals' holding on alter ego status is in conflict with decisions of the Seventh, Eighth, and Ninth Circuits.

a. In *Trustees of Pension, Welfare & Vacation Fringe Benefit Funds of IBEW Local 701* v. *Favia Electric Co.*, 995 F.2d 785 (1993) (Pet. 16), the Seventh Circuit addressed claims that two nominally distinct employers should be found to be either a single employer or alter egos of one another. The court first affirmed the district court's finding that the single employer doctrine was inapplicable because, *inter alia*, "the two [employers] were not commonly owned." 995 F.2d at 788. The court held, however, that that fact did not preclude application of the alter ego doctrine, because an alter ego relationship could be found to exist "even though no evidence of actual common ownership was present." *Id.* at 789. The court then stated that "unlawful motive or intent are critical inquiries in an alter ego analysis." *Ibid.* Finding no such motive present on the facts of the case, the court held the alter ego doctrine inapplicable. *Ibid.*

In *Favia Electric*, the Seventh Circuit relied in part on its prior decision in *International Union of Operating Engineers, Local 150* v. *Centor Contractors, Inc.*, 831 F.2d 1309 (7th Cir. 1987). In *Centor*, the court reached an alternative holding that, because of "[p]articularly damning" evidence that the defendants stated that they were dissolving one firm and setting up another "to avoid their obligations to the Union," the two firms would be treated as alter egos of one another. *Id.* at 1314.

The Seventh Circuit's decisions do not directly conflict with the First Circuit's decision in this case. The decision in *Centor* establishes only that evidence

of an improper motive to avoid union obligations may in some cases be so strong that it compels a finding that the alter ego doctrine applies. That conclusion is entirely consistent with the First Circuit's recognition in this case that motivation is an "important factor" in the inquiry. Pet. App. 8a. In *Favia Electric*, the Seventh Circuit relied primarily on the absence of an antiunion motive in concluding that the alter ego doctrine did not apply. But the court did so only after finding that the requirements of the single employer doctrine—in particular, the requirement of common ownership—were not satisfied. In those circumstances, it is possible that alter ego status could not be found without some form of intent to avoid union obligations. That principle, however, even if correct, does not conflict with the First Circuit's conclusion in this case that wrongful motive is not *always* required and that, where "a substantial * * * identity exists between the two [employers] along every axis," Pet. App. 11a—including common ownership—the alter ego doctrine is applicable.

Our conclusion that the Seventh Circuit has not definitively resolved the question whether improper motive is a prerequisite to application of the alter ego doctrine is reinforced by two further considerations. First, in *Esmark, Inc.* v. *NLRB*, 887 F.2d 739 (1989), the Seventh Circuit expressly noted that "[t]here is some dispute whether 'an intent to evade' statutory obligations through corporate restructuring is a necessary element of an alter ego finding." *Id.* at 754 n.24. Neither in *Esmark* nor in any of its subsequent cases did the Seventh Circuit purport to take a firm and general position on the issue.[10]

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[10] The Seventh Circuit in *Esmark* did discuss what it (mistakenly, in our view) believed to be the Board's doctrine in

Second, *Favia Electric* and *Centor* each discussed application of the alter ego doctrine in the context of a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, claiming that a change in corporate form did not excuse an employer from a breach of its obligations under a labor contract; consequently, the Board was not a party in either of those cases. It is therefore unclear what position the Seventh Circuit would take concerning application of the alter ego doctrine in reviewing a Board determination in a case in which it had the full benefit of the Board's views on the subject. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990) (Board's rules entitled to deference).

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this area. See 887 F.2d at 754; see also *Favia Electric*, 995 F.2d at 788 (quoting *Esmark*). However, the court's discussion was dicta, because the Board's theory of liability in that case was not based on an alter ego theory, but rather on the theory that the corporate veil between a parent and subsidiary corporation should be pierced. In cases involving the alter ego doctrine as applied by the Board, the Seventh Circuit has appeared to recognize the multi-factor nature of the analysis and has not suggested that a finding of improper motivation is necessary. For instance, in *NLRB* v. *Bell Co.*, 561 F.2d 1264 (7th Cir. 1977), the court explained that a finding of alter ego status may be founded upon "control or ownership of a new business by the prior owners of an old business." An alternative basis for finding the existence of a "disguised continuance," the court observed, exists "where the new business '. . . allows itself to become a substitute * * * serving to * * * evad[e] the consequences of the unfair labor practices committed.'" *Id.* at 1268 n.4 (quoting *NLRB* v. *Ozark Hardwood Co.*, 282 F.2d 1, 5 (8th Cir. 1960)). See also *NLRB* v. *Dane County Dairy*, 795 F.2d 1313, 1322 (7th Cir. 1986) (stating that "[c]ommon control of nominally distinct entities establishes alter ego status").

b. Likewise, the Eighth Circuit has not held that unlawful motive is a prerequisite to a finding of alter ego status. In *Crest Tankers, Inc.* v. *National Maritime Union*, 796 F.2d 234 (8th Cir. 1986) (Pet. 16), the court discussed the differences between the single employer and alter ego doctrines, holding that inquiry into motivation is not necessary to application of the single employer doctrine, but is "[a] critical part of the inquiry into alter ego status." 796 F.2d at 237. That conclusion is correct, since both the Board and the courts have recognized that motivation must be taken into account in determining whether to apply the alter ego doctrine. The court did not hold, nor did the district court on remand understand the court to have held, that unlawful intent is required for a finding of alter ego status. See *Crest Tankers, Inc.* v. *National Maritime Union*, 665 F. Supp. 1431, 1434-1435 (E.D. Mo. 1987) ("anti-union animus may be considered * * * [but] no single factor [is] dispositive"), appeal dismissed, 871 F.2d 1092 (8th Cir. 1988) (Table). Indeed, the Eighth Circuit indicated in a footnote that it did not disagree with a Sixth Circuit decision holding that improper intent is "not essential * * * to imposition of alter ego status." See 796 F.2d at 238 n.2. And in other decisions the Eighth Circuit has indicated that unlawful intent is not a necessary prerequisite to alter ego status. See, *e.g.*, *Woodline Motor Freight, Inc.* v. *NLRB*, 843 F.2d 285, 288 (1988) ("whether the change in operations is unlawfully motivated" is a "[f]actor[] to be considered").[11]

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[11] Accord *NLRB* v. *Campbell-Harris Electric, Inc.*, 719 F.2d 292, 295-296 (8th Cir. 1983) (finding alter ego status based upon shared business purpose, mode of operation,

c. The Ninth Circuit decisions cited by petitioner (Pet. 17) also do not conflict with the First Circuit's decision in this case. It is true that the Ninth Circuit has indicated that a finding of improper motivation accompanies application of the alter ego doctrine. In *A. Dariano & Sons, Inc.* v. *District Council of Painters No. 33*, 869 F.2d 514 (9th Cir. 1989), the court stated that "[i]n all alter ego determinations an element of fraud or misrepresentation also exists." *Id.* at 519. See also *UA Local 343* v. *Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1472 (9th Cir. 1994) (relying on *A. Dariano* to make the same point). Neither of those decisions, however, firmly establishes a conflict in the circuits on the issue.

First, as with the Seventh Circuit's decisions in *Favia Electric* and *Centor*, the Ninth Circuit's statement in *A. Dariano* was made without the benefit of the Board's participation in that case and was based on the mistaken belief that, under Board law, "[t]he NLRB obviously conceptualizes the alter ego test on the * * * theory of a trustee *ex maleficio* to

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method of supervision, equipment, customers, and substantial identity of ownership and management); *NLRB* v. *Ozark Hardwood Co.*, 282 F.2d 1, 7 (8th Cir. 1960) (alter ego status may be based upon sufficient "identity of business structure and interest * * * [o]r alternatively [where the new corporation] represent[s] an instrument of cooperation and evasion as to the labor-wrongs situation" of the old employer). Nor is *Iowa Express Distribution, Inc.* v. *NLRB*, 739 F.2d 1305 (8th Cir.), cert. denied, 469 U.S. 1088 (1984) (Pet. 17), to the contrary. There, the court found that, while there was "significant evidence" suggesting that the two entities involved were not alter egos, other objective evidence, taken together with evidence of unlawful motive, supported the General Counsel's position that the companies were alter egos. 739 F.2d at 1311-1312.

pierce the changed legal title and format of the successor." 869 F.2d at 518. It is unclear whether the Ninth Circuit would take a similar view if it were accurately informed of the Board's views on the subject.

Moreover, again as with the allegedly conflicting Seventh Circuit decisions, the Ninth Circuit's focus on unlawful intent in *A. Dariano* and *Nor-Cal Plumbing* may reflect the fact that both cases arose in a factual context in which evidence of the employer's motivation may be particularly important. Both *A. Dariano* and *Nor-Cal Plumbing* involved application of the doctrine to "double breasted" employer operations. In that setting, "[the] concern [is] that some contractors would use double-breasted operations *to avoid their collective bargaining obligations*," and the alter ego doctrine serves "to guard against such abuse." *Nor-Cal Plumbing*, 48 F.3d at 1469-1470 (emphasis added). Even if a finding of improper motivation were a prerequisite to application of the doctrine in that setting, however, it does not follow that it is a prerequisite in all possible contexts or, in particular, in the very different setting in which this case arose.

Finally, the Ninth Circuit has indicated in other cases that unlawful intent is not a necessary prerequisite of alter ego status. The court has stated that "the determination that one entity is merely another's alter ego will depend *to some extent* on whether or not the transfer of assets or the dissolution of the old entity is motivated by union animus." *Haley & Haley, Inc.* v. *NLRB*, 880 F.2d 1147, 1150 (1989) (emphasis added); accord *NLRB* v. *O'Neill*, 965 F.2d 1522, 1529 (1992), cert. denied, 113 S. Ct. 2995 (1993). See also *J.M. Tanaka Construction*,

Inc. v. *NLRB*, 675 F.2d 1029, 1033 (1982). Until the Ninth Circuit arrives at a firm position on the issue, it cannot be said that its position conflicts with that of the First Circuit in this case.

d. Petitioners are also mistaken in suggesting (Pet. 16) that the decision below is "inconsistent" with decisions of the Fourth Circuit. In *Alkire* v. *NLRB*, 716 F.2d 1014 (1983) (Pet. 18), the Fourth Circuit explained that, where "substantially the same entity controls both the old and new employer," the court will then inquire "whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations." 716 F.2d at 1020. That test, however, does not establish a requirement that the alleged alter ego entity must have been created for the purpose of evading the labor laws. Indeed, as the Fourth Circuit emphasized in a subsequent decision, "[t]he imposition of alter-ego status under *Alkire* does not hinge on proof that the employer intended to evade the labor laws." *NLRB* v. *McAllister Brothers, Inc.*, 819 F.2d 439, 445 n.14 (1987).[12]

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[12] Petitioners are also mistaken in suggesting (Pet. 20 n.16) that the commentators are divided into hostile camps on the issue whether unlawful intent is a necessary prerequisite to alter ego status. Two commentators reject that view. See Note, 86 Mich. L. Rev. 1024, 1054 (1988); S. Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation*, 1987 Wisc. L. Rev. 67, 103. Neither of the other writers cited by petitioners appears to argue for a rule making unlawful intent a necessary prerequisite. See Note, 54 N.Y.U. L. Rev. 624, 638 (1979) (observing that "the employer's motivation for the business change is an *important* element of the alter ego analysis") (emphasis added); F. Slicker, *A Reconsideration of the Doc-*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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trine of Employer Successorship—A Step Toward a Rational Approach, 57 Minn. L. Rev. 1051, 1064 (1973) (noting that alter ego cases "*include*[] situations in which a technical change in employer identity is merely incident to * * * that employer's union animus or an unlawful motive to avoid the commands of national labor laws") (emphasis added).

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